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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1060

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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February 14, 1967.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant, Oscar Gruss & Son (hereinafter called "Appellant" or "Gruss"), appeals from an order of the United States District Court for the Southern District of New York entered on November 28, 1966, granting summary judgment dismissing Appellant's complaint in an action to set aside, in part, orders of the Interstate Commerce Commission. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal, and that substantial questions are presented.

Gruss, with its partners and affiliates, holds approximately 14% of the First and Refunding Mortgage 4% Bonds ("first mortgage bonds") of The New York, New Haven and Hartford Railroad Company (the "New Haven"). The bonds are in default and the New Haven

is bankrupt. The claims of Gruss amount to approximately $10½ million principal and $2½ million interest.

In proceedings before the Interstate Commerce Commission (the "Commission") for the merger of The New York Central Railroad Company ("Central") into The Pennsylvania Railroad Company ("Pennsylvania"), the New Haven Trustees intervened to seek inclusion of the New Haven in the merged company ("Penn-Central") as a condition precedent to consummation of the merger.

After the close of the hearings, the New Haven Trustees abandoned that position on the basis of a private arrangement, disclosed months later, with the Pennsylvania and the Central. The Commission approved the merger on the condition, among others, that the New Haven be included in the merged Penn-Central at some indefinite time after the merger.

Within the period specified by the Commission, Gruss petitioned for leave to intervene in the merger proceedings and for reconsideration of the inclusion condition, its modification to require inclusion of the New Haven as a condition precedent to the merger, and an opportunity to be heard thereon. The Commission permitted Gruss to intervene but denied his petition for reconsideration, modification, and a hearing.

Gruss then brought this action to enjoin, annul, or set aside the second Commission order, insofar as it denied the relief sought by Gruss, and to require a modification of the first Commission order. The court below entered summary judgment dismissing the complaint.

In approving the merger, the Commission imposed protective conditions for other railroads adversely affected by the merger, but none for the New Haven. None would be needed if inclusion were effected at the time of merger. But the merger, if consummated first, would cause a ruin-

ous loss of revenue to the already bankrupt New Haven, and a grievous impairment of the assets available to satisfy the claims of the first mortgage bondholders.

The New Haven Trustees have abandoned the interests of the first mortgage bondholders. They have agreed to the postponement of the New Haven's inclusion in the merger. They have proposed a transfer of the New Haven properties to the Penn-Central, free of the bondholders' lien and without assent of the bondholders. They have agreed to a "price" for these properties, to be paid predominantly in Penn-Central stock which now has a market value of less than 60% of the first mortgage bondholders' claims to principal and interest. They have committed themselves to oppose any improvement of price or terms. They have filed a "reorganization plan" which provides for nothing but this sale of assets and cancellation of liens. They have demanded its consummation without any vote of security holders. They have indicated their intention to compel the first mortgage bondholders to share the Penn-Central stock with junior creditors and perhaps with stockholders by withholding distribution and attributing inflated values to the stock. They have worked to facilitate the Penn-Central merger on Pennsylvania's and Central's terms, at the expense of the first mortgage bondholders.

If the merger is consummated first, there can be no assurance that the New Haven will ever be included. If inclusion of the New Haven is frustrated for any reason, the damage to the first mortgage bondholders will be utterly irremediable.

Once the New Haven Trustees had changed their position, the first mortgage bondholders were altogether unrepresented in the merger proceedings until the petition of Gruss to intervene was filed and granted.

In denying the petition of Gruss for reconsideration, modification, and a hearing, the Commission assumed, contrary to fact, that the relief requested would necessarily delay the merger substantially. In fact, as the Gruss petition suggested, it would be wholly feasible for Penn-Central to take over the New Haven properties and operations immediately, subject to existing liens, which would then be satisfied on the basis of Commission and Court determinations of their equitable equivalent. The Commission concept of a public interest in both merger and inclusion would be protected without the unconstitutional destruction of property rights.

The court below dismissed the complaint upon the ground that Gruss had no right to be heard, except through the New Haven Trustees, misapplying decisions of this Court.

Appellant needs the protection of the Supreme Court of the United States. It submits this Jurisdictional Statement to show that the Court has jurisdiction, and that substantial questions are presented.

Opinions Below

The Order appealed from is that of a three-Judge statutory Court (28 U.S.C. §§ 2284, 2325). The opinion of the Court is not yet reported. A printed copy thereof is attached as Appendix A.

The Report and Order of the Commission dated April 6, 1966, are reported at 327 I.C.C. 475. The Report of the Commission on Reconsideration dated September 16, 1966, is reported at 328 I.C.C. 304. A printed copy of the Order of the Commission dated September 16, 1966, is attached as Appendix B.

Jurisdiction

The District Court action was commenced by Appellant on October 18, 1966, under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, to enjoin, annul, or set aside the order of the Commission dated September 16, 1966, insofar as it denied the relief sought by Gruss. The New Haven First Mortgage 4% Bondholders Committee was permitted to intervene as a party plaintiff. The New Haven Trustees, Pennsylvania, and Central were permitted to intervene as parties defendant.

The Order of the District Court was entered on November 28, 1966. Notice of Appeal from that Order to this Court was filed by Appellant in the United States District Court for the Southern District of New York on December 16, 1966.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §§ 1253 and 2101(b).

Jurisdiction is sustained by the decisions of this Court in *United States* v. *Drum*, 368 U.S. 370, 373 (1962), and *United States* v. *Georgia Public Service Commission*, 371 U.S. 285, 287 (1963).

The statutes involved in the case are:

28 U.S.C. §§ 1253, 1336, 1398, 2101(b), 2284, 2321-2325.

§§ 1, 5(1), 5(2)(a), (b), (c) and (d) and 5(9) of the Interstate Commerce Act (49 U.S.C. §§ 1, 5(1), 5(2) (a), (b), (c) and (d), and 5 (9)).

§§ 5(a), 5(b), 7(c), 8(b) and 10 of the Administrative Procedure Act (5 U.S.C. §§1004(a) and (b), 1006(c), 1007(b) and 1009).

§ 77(b), (c), (d), (e), and (f) of the Bankruptcy Act (11 U.S.C. § 205(b), (c), (d), (e), and (f)).

The texts of these provisions are attached as Appendix C.

Questions Presented

1. Whether the District Court erred in holding that Gruss did not have standing to seek an injunction against operation of the Orders of the Interstate Commerce Commission dated April 6, 1966, and September 16, 1966, insofar as they permitted the merger of Central into Pennsylvania without the simultaneous inclusion of the New Haven.

2. Whether the District Court erred in disregarding the statutory right of Gruss to institute and maintain the action pursuant to Title 28, United States Code, Section 2323 and *The Chicago Junction Case*, 264 U. S. 258 (1924).

3. Whether the District Court erred in holding that only the Trustees of the bankrupt New Haven have standing to seek review of an order of the Commission that would inflict irreparable damage on the New Haven first mortgage bondholders where Gruss, holding some 14% of the outstanding first mortgage bonds, had intervened and been admitted as a party in the Commission proceedings.

4. Whether the District Court erred in holding that the orders of the Commission attacked by Gruss do not deal with the interests of the New Haven first mortgage bondholders, and that the petitions of Gruss were not "timely".

5. Whether the District Court erred in interpreting two decisions of the Supreme Court of the United States, *Pittsburgh & West Virigina Ry.* v. *United States*, 281 U.S. 479 (1930), and *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957), as overruling *The Chicago Junction Case*,

supra, in respect of the statutory right of Gruss to institute and maintain the action.

6. Whether the District Court erred in holding that the Commission acted reasonably and within its powers in refusing, upon its admission of Gruss as a party in the merger proceedings, to grant Gruss a hearing in respect of the issues raised in the petitions of Gruss to the Commission, and to postpone consummation of the Penn-Central merger to permit the completion of such hearings.

7. Whether the District Court erred in holding that the decision of the Supreme Court of the United States in *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954), may be disregarded in weighing (a) the threat of irreparable injury to Gruss and other New Haven first mortgage bondholders posed by consummation of the Penn-Central merger without inclusion of New Haven, and (b) the power of the Commission, after consummation of the Penn-Central merger, to provide relief from such injury.

Statement of the Case

This is an appeal from an Order of a three-Judge U. S. District Court for the Southern District of New York granting summary judgment dismissing the complaint of Gruss seeking to enjoin the operation of certain Orders of the Commission which approved and authorized consummation of the merger of the Central into the Pennsylvania, without the simultaneous inclusion of (or any protection for) the bankrupt New Haven.

The first of these orders (the "April 6 Order", dated April 6, 1966, and served on April 27, 1966) approved and authorized the Penn-Central merger subject to certain conditions specified in the accompanying Report of the Commission (the "April 27 Report", 327 I.C.C. 475).

The second order here involved (the "September 16 Order", dated September 16, 1966, and served on September 19, 1966) granted a petition of Gruss for leave to intervene and become a party to the proceedings, and denied the petitions of Gruss (the "Gruss petitions", dated July 11, 1966, Exhibit B to the complaint in 66 Civ. 3413) in all other respects. The September 16 Order and the accompanying Report of the Commission on Reconsideration (the "September 16 Report", 328 I.C.C. 304) are annexed as Exhibit A to the complaint in 66 Civ. 3413.

Gruss is an investment banking firm that owns, together with its partners and affiliates, approximately $10½ million principal amount of the New Haven first mortgage bonds, approximately 14% of the total outstanding ($76,819,900 principal amount, with approximately $18 million interest in default).

Proceedings for the reorganization of the New Haven, under Section 77 of the Bankruptcy Act, were instituted in July 1961 and are pending in the U. S. District Court for the District of Connecticut (the "Reorganization Court"), Bankruptcy Docket No. 30226, and before the Commission, Finance Docket No. 21669. The Reorganization Court appointed three Trustees (the "New Haven Trustees") who qualified as such in August 1961. One of them died in May 1966. The other two, Richard Joyce Smith and William J. Kirk, continue to act as the Trustees of the New Haven.

The Penn-Central merger proceedings were instituted before the Commission in March 1962. The New Haven Trustees intervened therein, and took the position that inclusion of the New Haven in the merged Penn-Central should be required as a prerequisite to approval of the merger and as a condition precedent to its consummation.

The New Haven Trustees maintained and asserted that position in their Brief dated June 1, 1964, filed in the Penn-Central merger proceedings after the conclusion of the hearings.

Their argument was based in substantial part upon proof that the merger would cause the New Haven to sustain an annual loss of over $9½ million (over 13½%) of its freight revenue.

The New Haven Trustees requested the Commission to find that the proposed merger, as a consequence of its material and adverse effects upon the New Haven, would not be consistent with the public interest, and that it could not be approved by the Commission under Section 5 (2) (b) of the Interstate Commerce Act, unless the operations of the New Haven were included; and that such inclusion should be required as a condition precedent to consummation of the Penn-Central merger.

The Commission found, among other things:

1. Without some radical change in circumstances, even if the merger application were denied, the New Haven would face a nearly insuperable task of bringing itself out of bankruptcy. 327 I.C.C. at 522.

2. The Penn-Central, with new routings and improved service, could undoubtedly wean substantial traffic away from the New Haven and leave that already moribund carrier in perhaps an irretrievable situation. 327 I.C.C. at 522.

3. The Penn-Central merger, without complete inclusion of the New Haven, would not be consistent with the public interest. 327 I.C.C. at 524.

4. Inclusion of the New Haven's freight and passenger operations in the Penn-Central merger will be consistent with the public interest. 327 I.C.C. at 526-7.

In the April 6 Report, the Commission recognized that the Penn-Central merger would also result in diversion of traffic from three other railroads, namely, Erie-Lackawanna Railroad Company ("E-L"), The Delaware and Hudson Railroad Company ("D & H"), and Boston and Maine Corporation ("B & M"). In respect of those three railroads, the April 6 Report and Order incorporate special provisions and conditions for their protection against diversion of traffic, and for their indemnification against loss from such diversion as might occur. (See Appendix G to the April 6 Report, 327 I.C.C. 561-3, incorporated in the first ordering paragraph of the April 6 Order.)

In the April 6 Report, the Commission also recognized that the inclusion of the New Haven in the merger might result in diversion of traffic from three other railroads, namely, The Reading Company ("Reading"), The Central Railroad Company of New Jersey ("Jersey Central"), and The Western Maryland Railway Company ("Western Maryland"). The New Haven Trustees, the Pennsylvania, and the Central were required to negotiate with Reading, Jersey Central, and Western Maryland concerning the amount of traffic of those railroads subject to diversion by reason of the inclusion, and as to any conditions needed to protect the latter three railroads. The Commission reserved jurisdiction to consider and determine the traffic to be diverted, and the protective conditions required for those railroads, but not for the New Haven. (See Appendix A to the April 6 Report, Condition No. 8 (327 I.C.C. at 553), incorporated in the first ordering paragraph of the April 6 Order.)

The April 6 Order purports to require the inclusion of the New Haven in the Penn-Central merger, but not as a condition precedent to consummation of the merger. On the contrary, it permits the Pennsylvania and the Central to consummate the merger within 35 days, allowing six months after April 27, 1966, before any program need be filed for the inclusion of the New Haven. No time limit is set for actual inclusion.

Despite the findings referred to above, the April 6 Order utterly ignores the impact of the Penn-Central merger upon the traffic, the revenues, and the financial condition of the New Haven. No protective conditions are imposed, and no provision is made for the future imposition of protective conditions.

The six railroads referred to above, and The Norfolk and Western Railway Company ("N & W"), filed petitions with the Commission seeking enhanced protection from the adverse consequences of the merger. The New Haven Trustees filed no request for protection of the New Haven, despite the fact that their demand for inclusion of the New Haven as a condition precedent to the Penn-Central merger had been rejected by the Commission.

In December 1964 the New Haven Trustees reached an understanding with the Pennsylvania and the Central. The understanding was not announced until April 7, 1965, and was formalized a year later in an "Agreement" dated April 21, 1966 (the "April 21 Document"). There were no hearings on the 1965 Report, which stated that a definitive agreement would be prepared "as promptly as possible" and submitted to the Court for appropriate action "upon its completion." No hearings on the April 21 Document were held until October 1966.

The April 21 Document provides for the transfer to the Penn-Central of essentially all the assets of the New

Haven other than certain current assets, free of the lien of the first mortgage bonds (Section 3.2), and without payment or provision for the payment of the claims of the holders of the first mortgage bonds in whole or in part, in cash or in kind.

In and by the April 21 Document, the New Haven Trustees limit the statements, stipulations, or other documents to be filed by them in the Penn-Central merger proceedings before the Commission, or in any judicial review thereof, thus abandoning the position they had previously taken that inclusion of the New Haven's operations should be required by the Commission as a condition precedent to consummation of the Penn-Central merger (Section 11.7).

In and by the April 21 Document, the New Haven Trustees commit themselves to the Pennsylvania and to the Central to use their best efforts, as Trustees, to effect consummation of the transactions contemplated thereby (Section 30.4).

Thus by April 27, 1966, when the April 6 Report and Order were served, the New Haven Trustees had disabled themselves from maintaining their previous position before the Commission, and in effect had left the first mortgage bondholders without representation in the Penn-Central merger proceedings. Even worse, they had committed themselves to the Pennsylvania and the Central to oppose any efforts of first mortgage bondholders (a) to secure protection for the New Haven from the adverse effects of the Penn-Central merger, by simultaneous inclusion or otherwise, or (b) to improve, from the standpoint of the New Haven, the terms of inclusion.

On July 11, 1966, the Gruss petitions were filed for leave to intervene in the Penn-Central merger proceedings and for reconsideration, further hearing, and mod-

ification of the condition relating to the New Haven, that is, Condition No. 8 set forth in Appendix A of the April 6 Report (327 I.C.C. at 553), incorporated in the first ordering paragraph of the April 6 Order. The Gruss petitions were opposed by the Pennsylvania, the Central, and the New Haven Trustees.

The Gruss petition for reconsideration, further hearing, and modification of condition prays for the entry of an order by the Commission reconsidering and modifying said Condition No. 8 to require inclusion of the New Haven at the time of and as a condition precedent to the merger of the Pennsylvania and the Central, holding further hearings, and postponing consummation of the merger to permit the completion of such hearings, and such inclusion of the New Haven. That petition was, in all respects, denied by the September 16 Order.

The September 16 Report and Order were served on September 19, 1966. Meanwhile, early in September, three actions had been instituted in the District Court (the "Railroad Review Proceedings") to enjoin, annul, or set aside the April 6 Order:

> Erie-Lackawanna Railroad Company v. United States of America and Interstate Commerce Commission, 66 Civ. 2860;
>
> The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, and Norfolk and Western Railway Company v. United States of America, 66 Civ. 2903; and
>
> The Central Railroad Company of New Jersey and Reading Company v. United States of America, 66 Civ. 2914.

The Railroad Review Proceedings were consolidated for hearing before the same three-Judge Court that sat in

the instant proceedings. Appeals from an Order dated October 4, 1966, denying motions for a temporary injunction therein, are pending before this Court. The merger has been stayed pending this Court's decision of those appeals.

Gruss has not appeared in the Railroad Review Proceedings. The New Haven Trustees intervened therein as a party defendant, along with the Pennsylvania and the Central.

Commencing on October 31, 1966, the Commission has conducted hearings in the Penn-Central merger proceedings limited to the matter of modification of Appendix G to the April 6 Report, that is, the conditions dealing with the protection of E-L, D & H, and B & M, but not of the New Haven.

Under Section 77 of the Bankruptcy Act, the New Haven Trustees had the statutory right to file with the Commission and the Reorganization Court a plan for the reorganization of the New Haven. On September 13, 1966, the Trustees filed in the Reorganization Court a petition for authority to file a "reorganization plan" with the Commission.

Objections to the request of the Trustees for permission to file this so-called "plan" were filed by Gruss and by other representatives of bondholders. Following a hearing held on October 10, 1966, the Reorganization Court entered an Order and a Memorandum of Decision dated October 24, 1966, granting the petition of the New Haven Trustees. Gruss has appealed from the Order.

On October 27, 1966, the very last day permitted by the April 6 Order, the New Haven Trustees filed with the Commission in Finance Docket 21669 (the New Haven reorgani-

zation proceeding) a statement and a document purporting to be a plan of reorganization of the New Haven, and in Dockets No. 21989 and 21990 (the Penn-Central merger proceedings) a supplement to their 1962 petition for intervention, requesting consolidated hearings in all three dockets. Those hearings are now in process.

The document purporting to be a plan of reorganization of the New Haven (the "New Haven Trustees' Proposal") incorporates the April 21 Document and is divided into two "steps".

The "First Step" is defined as the conveyance of the New Haven's property and other assets to Penn-Central in accordance with the April 21 Document, as amended on October 4, 1966, or as it may be amended, modified, or supplemented at any time. The "Second Step" is to be set forth some day in an amendment, which may provide either for a distribution of assets or for the issuance and distribution of new securities.

The New Haven Trustees' Proposal is not in fact a plan, and does not provide for a reorganization. It is simply a proposal to strip the New Haven of its property and the first mortgage bondholders of their security—without their vote on the matter—and then to submit any future proposals that they might in their wisdom deem necessary, or proper, or desirable.

The first mortgage bondholders are not so much as mentioned in the New Haven Trustees' Proposal, but are simply lumped in under the word "creditors." Creditors are not even to be classified, much less compensated, until after consummation of the stripping operation labeled the "First Step".

The "First Step" would leave the New Haven without assets sufficient to pay the claims of the first mortgage

bondholders. Apart from assets required to take care of administration claims and taxes ahead of secured creditors, the bulk of the price payable by the Pennsylvania to the New Haven Trustees, part at the time of the conveyance and part 140 days later, consists of 950,000 shares of Pennsylvania Railroad stock, now worth about $60 per share. The highest price reached during the ten years prior to 1966 was 65; in 1966 it ranged from a low of 40½ to a high of 73⅜. It is impossible to tell from the information heretofore supplied whether there will be anything else available for creditors junior to claims for administration expenses and liabilities incurred by the New Haven Trustees, or indeed how much of the Pennsylvania Railroad stock will be available. It is all worth approximately $57 million; the claim of the first mortgage bonds is approximately $95 million.

The "First Step" would not change the capitalization of the New Haven, other than to cancel existing liens on the property to be conveyed. In other words, the first mortgage bonds would continue to exist in name only. Their mortgage would have disappeared.

In the face of these facts the New Haven Trustees' Proposal makes the incredible statement that the interests of each class of creditors "will not be adversely and materially affected by consummation of the First Step," and specifically states:

> "The First Step of the Plan will not be submitted to any class of stockholders or creditors, other than the United States of America, for acceptance or rejection."

The New Haven Trustees' Proposal provides for no payment whatsoever to the holders of the first mortgage bonds, either in cash or in kind. There is only the vague statement that all liens "shall be recognized", by someone, as continued liens on the assets of the so-called reorganized company, with a bland disregard of the inadequacy of

those assets to satisfy the claims of the first mortgage bonds. The only provision for payment to anyone contained in the New Haven Trustees' Proposal is in Section IX, providing for payment of expenses of administration of the estate and allowances to the Trustees, their attorneys, and their experts.

In order to assure utter vagueness and to dispel any possibility of bondholders' knowing what the New Haven Trustees have in mind, Section X of their Proposal authorizes the New Haven Trustees to file, from time to time, any amendments they may consider necessary or appropriate. In Section XI, the New Haven Trustees purport to give themselves full power and authority, among other things, to take any and all steps deemed by them to be necessary or proper to effectuate or consummate their proposal. Subject to approval of the Court, and, where applicable, of the Commission, they purport to give themselves the power to determine terms, provisions, and covenants to be omitted, added, changed, or retained in any instrument, document, or paper (including the charter and by-laws of the New Haven) that may be necessary, or that they may simply deem desirable, to consummate and carry out their proposal.

The New Haven Trustees' Proposal is a caricature of a plan, flouting the requirements of subsections (b) and (e) of Section 77 of the Bankruptcy Act. It demonstrates on the face of the document that it cannot form a basis for inclusion of the New Haven in Penn-Central. It further demonstrates the inherent vice of the Commission's orders permitting the Pennsylvania and the Central to merge, without inclusion of the New Haven at the time of and as a condition precedent to the merger. More than ten months after the date of the April 6 Order the New Haven remains in limbo, its assets dwindling, without a practicable program for inclusion in the merged Penn-Central.

The income statements, annexed as Exhibit C to the statement of the New Haven Trustees accompanying their proposal, show a deficit in net income for every year of their operation of the estate, as set forth in paragraph 18 of the Gruss Complaint, exceeding $12 million per annum. It is obvious that the New Haven's assets are dwindling fast, and will dwindle faster if the Penn-Central merger is consummated without simultaneous inclusion of the New Haven.

The New Haven's property and other assets are still more than enough per books (Exhibit B to the Trustees' statement), and are probably enough in fact, to pay the first mortgage bonds in full, but the first mortgage bondholders will never be permitted to realize those values if Pennsylvania and Central have their way, with the assistance of the New Haven Trustees.

The Questions Presented Are Substantial

The questions presented by this appeal are substantial and require plenary consideration for their resolution. They arise out of the determination of the Commission, and of the Court below, to ignore the destructive impact of the Commission orders on the New Haven and its first mortgage bondholders. A basic vice of the decision below is its assumption that somehow, some day, the New Haven will be included in the merged Penn-Central and that then, whenever it may occur, a way will be found to rectify the damage, unless it can be blamed on the bondholders themselves.

Starting with its assumption that the New Haven would some day be included in the Penn-Central merger, the Court below suggests reasons for kindly treatment of the New Haven by Penn-Central during the interim.

However, fatal damage to the New Haven could result even if Penn-Central does not lift a finger to bring it about. Further, Penn-Central will be under an obligation to its stockholders to compete ruthlessly with the New Haven—particularly in view of the fact that inclusion of the New Haven is at best only probable, not actually inevitable, the terms still undecided and the time indefinitely delayed.

The treatment of Gruss in these proceedings has operated as a triple whipsaw. He was told that he has no standing to complain because (a) his interests are adequately represented by someone else; (b) he should have complained yesterday; and (c) he will somehow be taken care of tomorrow. The errors of this reasoning are essentially that (a) Gruss has been abandoned by the New Haven Trustees; (b) he had no genuine opportunity to be heard prior to the April 6 Order; and (c) the protection he can receive tomorrow is being vitiated today.

POINT I

The District Court erred in holding that Gruss did not have standing to obtain judicial review of the Order of the Commission dated September 19, 1966, and in disregarding the statutory right of Gruss to institute and maintain the action pursuant to Title 28, United States Code, Section 2323 and *The Chicago Junction* case, 264 U.S. 258 (1924).

The Court below held that Gruss had no standing to maintain this action. It misread two decisions of this Court,[1] neither involving a bankrupt carrier or its creditors, as holding that on an application for merger of two car-

[1] *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479 (1931); *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957).

riers, the interests of other carriers are to be represented by their managements and not by individual investors. The opinion treats these cases as overruling, *sub silentio*, the contrary holding in *Chicago Junction, supra*, and fails even to mention the applicable statute.

The right of Gruss to institute and maintain this action is based upon Title 28, Chap. 157, Sec. 2323 of the U. S. Code, 62 Stat. 970, 63 Stat. 105, providing in part:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

Gruss is a party to the Penn-Central merger proceedings. His petition for leave to intervene was opposed by the Pennsylvania and the Central, but granted by the Commission in the September 16 Order. Neither the Pennsylvania nor the Central sought review of the September 16 Order.

Gruss has a substantial interest in the proceedings before the Commission as the owner of approximately 14% of the outstanding first mortgage bonds, secured by a mortgage on substantially all the property and other assets of the bankrupt New Haven. The record on which the April 6 Order was based, the positions taken by the New Haven Trustees, and the findings of the hearing examiners and the Commission show the destructive impact on the interests of Gruss and other bondholders that would result from the Penn-Central merger, and from the Commission orders (a) authorizing consummation of the merger without simultaneous inclusion of the New Haven, and (b) denying the modification and the hearing sought by the Gruss petitions.

The action instituted by Gruss involves the validity of parts of the April 6 and September 16 Orders, and the interest of Gruss. Gruss' status as a party to the Commission proceeding, and his standing to seek judicial protection from consummation of the orders of the Commission, are established. *Chicago Junction Case,* 264 U.S. 258, 267-8 (1924). Referring to Section 212 of the Judicial Code, the predecessor of 28 U.S.C. § 2323, the Court said:

> "The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest."

The Court below relied heavily on *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479 (1930). In that case an intervenor in a Commission proceeding on applications for certificates of public convenience and necessity, whose only pertinent interest was as a minority stockholder of the applicant, was held not entitled to bring suit to set aside the Commission order. But the Court specifically distinguished cases such as the instant one (281 U. S. at 487):

> "Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors."

The Court below erroneously construes this Court's decision in *Alleghany Corp.* v. *Breswick & Co.,* 355 U. S. 151 (1957), as holding that:

> "common stockholders of Alleghany Corporation did not have standing to obtain judicial review of I.C.C. orders authorizing a merger of railroads in whose

> common parent Alleghany was a large stockholder and determining that Alleghany was a carrier subject to regulation by the Commission • • •".

This Court's decision in *Breswick* is directly contrary to the District Court's view of it. This Court said (353 U.S. at 159-160):

> "Alleghany urges initially that the Commission's order dealing with its status under the Interstate Commerce Act and dealing with its new preferred stock were not reviewable at the suit of appellees, that appellees had no standing. *We find that appellees do have standing to challenge the orders.* This is not a case where 'the order under attack does not deal with the interests of investors' or where 'injury feared is the indirect harm which may result to every stockholder from harm to the corporation.' *Pittsburgh & W. Va. R. Co.* v. *United States*, 281 U. S. 479, 487." (Emphasis supplied.)

This Court upheld the order of the Commission determining the status of Alleghany, and held that appellees did not have a right to a public Commission hearing on that issue. It was in that respect only that this Court distinguished between the interests of the appellees in the two Commission proceedings.

The misreading of *Breswick* by the Court below is reflected in its overextension of *Pittsburgh & W. Va.* (*supra*), making the latter case—despite its express language—appear as a limitation on secured creditors of a bankrupt railroad. The impact of the Commission orders on Gruss and the other first mortgage bondholders is far more direct and grievous than the interest which gave standing to the minority stockholder in *Breswick*—*i.e.* protection against potential dilution upon the possible conversion of preferred stock to be issued.

In *New York Central Securities Corp.* v. *United States*, 54 F. 2d 122 (S.D.N.Y. 1931), aff'd 287 U. S. 12 (1932), the District Court upheld the standing of a minority stockholder to challenge a Commission order approving the acquisition of control by the Central of railroads in which plaintiff was a minority stockholder. The Court, in an opinion by Judge Mack, found support for the standing of the plaintiff in the passage cited above from *Pittsburgh & W. Va.* It held that the proposed transfer of control through leases created an interest in the minority stockholders so that they could be injured as a class.

This case is directly analagous to *New York Central Securities*. The inclusion of the New Haven, if and whenever it takes place, like the leases in *New York Central Securities*, would be a step toward a direct payment to the bondholders. Here the Orders of the Commission threaten to destroy rather than to create financial interests of the First Mortgage bondholders. But by virtue of that very fact they create the kind of interest giving rise to standing to bring the action in the District Court—a difference which is an added reason for permitting suit by a bondholder so affected.

The Court below deemed it to be an essential distinction, in the *Central* case, that the interest of the complaining stockholder arose, "not merely" as Judge Mack said, *derivatively* by virtue of his ownership of stock, but *independently* as a "member of a class" created by the leasing arrangements complained of. The distinction makes no difference. Gruss is not a stockholder—he is a creditor. His interest is direct by virtue of a threatened stripping of his lien and irreparable damage to the liened property. He is not truly represented otherwise than by himself and his counsel. His danger is real and his potential harm is great. These facts stand out from all fine-spun dialectic seeking fine distinctions in status.

Gruss has the requisite standing to bring and maintain this action.

POINT II

The District Court erred in holding that only the Trustees of the bankrupt New Haven have standing to seek review of an order of the Commission that would inflict irreparable damage on First Mortgage bondholders.

The New Haven Trustees have very broad powers indeed in respect of the estate and assets of the bankrupt railroad. Among them are the rights to prosecute and to defend ordinary causes of action against third parties, as noted by way of dictum in *Meyer* v. *Fleming*, 327 U. S. 161, 169 (1946).

However, the exclusion of creditors from participation in proceedings does not apply to the basic proceedings that involve the reorganization, indeed the very existence, of the New Haven. Security holders and creditors having an interest in the estate have a right to be heard, along with the Trustees, in the reorganization proceedings before the Commission and the Reorganization Court.

Once it is shown, as it has been here, that the Penn-Central merger proceedings go to the very heart of the New Haven's continued existence as a company, the same rule applies. The New Haven Trustees advised the Commission and the Reorganization Court that a merger of the Pennsylvania and the Central which failed to include the New Haven "would prevent the reorganization of the New Haven Railroad." The effect of such a merger on the New Haven, as found by the hearing examiners and the Commission, would be to "effectively destroy its ability to survive." Time is a vital dimension of the continuing truth and reality of both of these statements, and time has been sacrificed by the New Haven Trustees in their

about-face on the vital question of inclusion of New Haven in the merger as a condition precedent. Appellant is either given or deprived of the means of protecting himself by being recognized or excluded as a party with standing to bring the action brought before the District Court. It must be remembered that appellant, holding more than 10% of the outstanding first mortgage bonds, is one of the limited group authorized, along with the New Haven Trustees, to file a plan of reorganization, prior to the institution of plan proceedings and without obtaining the consent of the Commission.[2] The Bankruptcy Act thus recognizes the right of a substantial creditor to speak for himself and to be heard on his own behalf.

A reorganization is a total determination of the rights of the claimant in the estate. Every major aspect of a plan determining the outcome of a class is a vital aspect of the plan—to be determined only after all of the necessary procedures and protections have been provided to the interests in the reorganization. The procedure proposed by the New Haven Trustees would let the Penn-Central merger come first, and then transfer all the property of the New Haven to Penn-Central, without the consent of any security holders, in violation of *St. Joe Paper Co.* v. *Atlantic Coast Line R. R.*, 347 U. S. 298 (1954), and without the submission of a "complete plan of reorganization," in violation of *Palmer* v. *Massachusetts*, 308 U. S. 79, 88 (1939). It would strip the first mortgage bondholders first of a substantial part of the value of their mortgage lien, and then of the lien itself, without their assent and without knowledge or means of knowing what each step forbodes for their ultimate outcome when claims are classified and distributions proposed. The three-step pro-

[2] Bankruptcy Act, Sec. 77 (d). The Debtor is directed to file a plan. Plans may also be filed by the Trustees, by not less than 10% of the creditors of any class, by not less than 10% of the stockholders of any class, or, with the consent of the Commission, by any party in interest.

cedure is not a plan—and if it were it would be a shocking violation of equity and of due process in reorganization.

It may well be that the Trustees could and did preempt the field of participation in the Penn-Central merger proceedings, so long as they demonstrated a willingness to fight for the common interests of all creditors. However they have lost the right to preempt the field. They not only abandoned their position on inclusion of the New Haven, by private arrangements with the Pennsylvania and the Central in December 1964 which were not disclosed prior to April 7, 1965, but they agreed to terms that create a direct conflict between their commitments to the Pennsylvania and Central and the interests of first mortgage bondholders. It was grave error for the Court below to fail to recognize that the New Haven Trustees could no longer represent the interests of the first mortgage bondholders in the Penn-Central merger proceedings.

The earliest and the only feasible course of self-protection available to Gruss is the one he has taken. Gruss was not a party either to the Penn-Central merger proceedings or to the proceeding pending before the Reorganization Court. In May 1965 counsel for Gruss asked for a conference with the New Haven Trustees. This was refused. In June 1965 Gruss filed a petition for leave to intervene in the Reorganization Court proceeding. The petition was opposed by the New Haven Trustees and, in August 1965, was denied by the Reorganization Court. The right of Gruss to be heard on questions arising in the proceedings was recognized by the Reorganization Court, but no hearings involving the Penn-Central merger were held by the Reorganization Court prior to October 1966.

In April 1966, the April 21 Document was executed and circulated, and shortly thereafter the April 6 Report and Order were served. It was then clear that the New Haven

Trustees were committed, by what they regarded as an agreement, to a program adverse to the interests of the first mortgage bondholders. On July 11, 1966, within the time set by the Commission, Gruss sought and was granted leave to intervene in the merger proceeding.

The right of Gruss to file with the Commission necessarily implies the right of Gruss to orderly and effective judicial review of the Commission's determination. *Chicago Junction Case, supra; Florida East Coast Railway* v. *United States*, 228 F. Supp. 340, 343 (M.D. Fla. 1964).

CONCLUSION

This Court has jurisdiction. The questions presented are substantial.

MYRON S. ISAACS
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New York, N.Y. 10017

February 14, 1967.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

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66 Civ. 3425

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

Before FRIENDLY, Circuit Judge, WEINFELD and LEVET, District Judges.

Myron S. Isaacs, New York City (Myron S. Isaacs and Paul M. Gartner, New York City, of counsel), for plaintiff Oscar Gruss & Son.

Migdal, Low, Tenney & Glass, New York City (Lester C. Migdal, Lawrence W. Pollack, and David V.

Handelman, New York City, of counsel), for plaintiff Bondholders Committee.

Robert W. Ginnane, Washington, D.C., for defendant Interstate Commerce Commission.

Sullivan & Worcester, Boston, Massachusetts (Joseph Auerbach, Arthur Blasberg, Jr., and Robert W. Bleakney, Jr., Boston, Massachusetts, of counsel) Robert M. Peet, New York City, and James W. Moore and Robert W. Blanchette, New Haven, Connecticut, for intervening defendants Trustees of The New York, New Haven and Hartford Railroad Company.

Conboy, Hewitt, O'Brien & Boardman, New York City (Windsor F. Cousins and David J. Mountan, Jr., New York City, of counsel) for intervening defendant Pennsylvania Railroad Co.

Gerald E. Dwyer, New York City (James B. Gray and Jerome H. Shapiro, New York City, of counsel), for intervening defendant New York Central Railroad Co.

FRIENDLY, Circuit Judge:

In these actions against the United States and the Interstate Commerce Commission, Oscar Gruss & Son, which has acquired some $10,500,000 of the First and Refunding Mortgage 4% bonds of The New York, New Haven and

Hartford Railroad Company (NH), and a bondholders' committee claiming to have authorizations from holders of some $20,000,000 of such bonds,[1] which has also intervened as plaintiff in Gruss' action, seek to enjoin consummation of the merger of the New York Central Railroad Company (NYC) with the Pennsylvania Railroad Company (PRR) [the proposed merged company being hereafter referred to as the Transportation Company], as authorized by the Commission in its report served April 27, 1966, 327 I.C.C. 475, and its report on reconsideration of September 16, 1966, 328 I.C.C. 304. A decision in which this court, by a divided vote, refused to enjoin consummation at the instance of competing railroads, *Erie-Lackawanna R.R.* v. *United States,* — F. Supp. —, is under appeal to the Supreme Court, with argument set for January 9, 1967 and the merger stayed until determination by the Court. NYC, PRR and the Trustees of NH have intervened as defendants and join the Interstate Commerce Commission in opposing the grant of a temporary injunction. The Commission has moved under Rule 12(b) to dismiss the complaints; NYC and PRR have moved for the same relief, also asking for summary judgment under Rule 56 on the basis of the record in the marger proceeding before the Commission and of the reorganization proceeding of NH under § 77 of the Bankruptcy Act in the District Court for Connecticut. Appended to the memorandum of the NH trustees is an affidavit of their counsel outlining the various steps taken by them with copies of relevant papers, which we may also consider on the motion for summary judgment.

The Commission's order approving the merger contained the following condition with respect to NH, 327 I.C.C. at 553:

"8. The Pennsylvania New York Central Trans-

portation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company—the inclusion of passenger operations being subject to the findings and determinations of the Commission as set forth in Finance Docket No. 23831 issued simultaneously with this report—upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (and subject to approval by the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose.

• • • •

"Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements."

Although the defendants and intervening defendants in the *Erie-Lackawanna* case, including the four states served by NH, argued to us that this condition was one of the strong public interest considerations favoring the merger and no one disagreed, Gruss and the Committee claim it is entirely inadequate. They point to a passage in the Commission's report, 327 I.C.C. at 522-27, where, after discussing the more limited recommendation of the hearing examiners on the subject of inclusion of NH, the Commission found "that this merger, without complete inclusion of NH, would not be consistent with the public interest, and, accordingly, we will require all the New Haven railroad"—passenger as well as freight service—

"to be included in the applicants' transaction." 327 I.C.C. at 524. Yet, say the plaintiffs, despite this and a further finding that "the Transportation Company, with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation," 327 I.C.C. at 522, the Commission imposed no such protective traffic and financial conditions for the interval prior to actual inclusion of NH—probably a fairly long one in view of reorganization problems under § 77—as it did with respect to the Erie-Lackawanna, the Delaware & Hudson and the Boston & Maine. They ask in consequence that we enjoin consummation of the merger until NH is effectively protected by actual inclusion.

Much of the seeming anomaly dissolves quite speedily. From a practical standpoint the interim relationship of the Transportation Company to NH will be altogether different from its relationship to the three protected lines. The overwhelming likelihood is that the latter will remain significant competitors, probably as future components of the Norfolk & Western system, see *Erie-Lackawanna R.R. v. United States, supra*, — F. Supp. at — n. 4; although the Commission reserved jurisdiction to entertain petitions for their inclusion in the Transportation Company in the event of denial of their pending petitions for inclusion in the Norfolk & Western, 327 I.C.C. at 553, no one could have believed that to be the likely outcome. In contrast the expectation was that NH would become a part of the Transportation Company—indeed, there is rather general agreement that it must if it is to continue operations at all. It is thus somewhat unrealistic to suppose that the Transportation Company will immediately embark on a wholesale campaign of diversion from a future component, breaking the historic bonds between PRR and NH initially forged by geography and welded by millions

of dollars of expenditures, only to renew them again some time hence; and plaintiffs' reliance on findings of the hearing examiners and the Commission with respect to the drastic effects of the merger on NH in the absence of any requirement of inclusion is wholly misplaced. But they argue that, despite the strong prospect of inclusion of NH in the Transportation Company, the latter nevertheless has an incentive to engage in some diversion since although PRR, NYC and the NH Trustees have agreed upon the purchase price, this is still an open issue in view of the dissatisfaction of NH bondholders, and diversion of NH freight revenues to NYC's competing service would benefit the Transportation Company both directly and by justifying what plaintiffs consider the unduly low figure to which the Trustees agreed. Moreover, they find a further incentive for diversion in the possibility that NH may never be included; although NH has a call on the Transportation Company, decision whether to exercise this depends on the course of the reorganization and the bankruptcy court may be persuaded, or compelled, to liquidate NH rather than cause it to be sold to the Transportation Company as a going concern.

The argument would seem to be sufficiently answered by the powers vested in the Commission under § 5(2) of the Interstate Commerce Act. It has been settled for four decades that the requirement of § 5(2)(b) and its predecessors that the Commission find the conditions of a merger to be just and reasonable makes it "the duty of the Commission to protect both the public and private interests" and to withhold approval of a transaction that is otherwise in the public interest unless it finds "that the consideration, terms and conditions thereof are just and reasonable" to the parties and holders of their securities. *Cleveland, C., C. & St. L. Ry.* v. *Jackson,* 22 F.2d 509, 510-11 (6th Cir. 1927); see *United States* v. *Lowden,* 308 U.S.

225, 233 n.1 (1939); *Schwabacher* v. *United States*, 334 U.S. 182, 198-99 (1948); 3-A Sharfman, The Interstate Commerce Commission 466-72 (1935). Combination of this general principle with the express authority now given by § 5(2)(d) to require merging carriers to include other railroads "upon equitable terms" would surely empower the Commission, if so advised, to base the acquisition price of NH upon a value not adversely affected by the NYC-PRR merger itself—whether by using the value of the property as of the date of the merger as a base, by adjusting subsequent earnings to restore diverted revenue, or by other appropriate means; the availability of such relief differentiates NH sharply from the three protected roads. On being queried why this was not adequate protection, plaintiffs' attorneys answered that even though the Commission had the power we have indicated, there was no assurance it would use this, or use it fully, especially in view of the position of the NH Trustees that the agreement already concluded by them with NYC and PRR confers adequate protection;[2] they pointed also to the possibility that bondholders might prevail on the reorganization court to liquidate NH in order to realize on its valuable real estate holdings, in which event no acquision under § 5(2) would occur. All this reflects a mistaken notion of NH's rights. The Commission is not under a mandate to protect against all diversion as a condition to the grant of immunity under the antitrust laws, as plaintiffs seem to think; it is concerned with diversion only as this bears on the "public interest," and that concept "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities," *New York Central Sec. Corp.* v. *United States*, 287 U.S. 12, 25 (1932), with investor interest an element only insofar as its protec-

tion will serve to attain these goals. Decision on the degree of protection to be afforded is thus vested in the agency charged with responsibility for the transportation system, subject only to the usual limited judicial review. *New York Central Sec. Corp.* v. *United States, supra,* 287 U.S. at 29. We would agree with Judge Anderson's statement, in authorizing the Trustees to proceed before the Commission, that it is for that agency "to determine in passing upon the plan for the inclusion whether these provisions [negotiated by the Trustees] adequately protect the estate for any possible losses in the time between consummation of the Penn-Central merger and inclusion of the New Haven, or whether additional terms are required."

In fact, however, we do not need to decide whether the condition with respect to inclusion of NH gives adequate protection since, in our view, plaintiffs are not now in a position to raise it. For we read the decisions of the Supreme Court as holding that on an application for merger of two carriers the interests of other carriers are to be represented by their managements and not by individual investors.

In *Pittsburgh & West Virginia Ry.* v. *United States*, 281 U.S. 479 (1930), the Pittsburgh, a minority stockholder in the Wheeling & Lake Erie, sought to enjoin an I.C.C. order authorizing the Wheeling to abandon its passenger station in Cleveland, Ohio, which was to be sold to a new terminal building company, and to use the new terminal and certain temporary facilities pending completion. The complaint alleged, *inter alia,* that the price being obtained by the Wheeling was inadequate and that the Commission had erred in holding it had no jurisdiction to consider that question. The Court held that the Pittsburgh "had no standing to bring the suit as one to set aside the order of the Commission." 281 U.S. at 486. Although the Pittsburgh had been an intervenor before the Commission,[3] Mr.

Justice Brandeis said, despite an arguably contrary earlier statement by him in *The Chicago Junction Case*, 264 U.S. 258, 268 (1924), that such intervention did not entitle the Pittsburgh "to institute an independent suit to set aside the Commission's order, in the absence of resulting actual or threatened legal injury to it," 281 U.S. at 486. As to this, "the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation." 281 U.S. at 487. The "some cases" phrase was illuminated by a footnote referring to various I.C.C. decisions considering the fairness of acquisitions to security holders of the roads to be acquired.

A few years later, this court, speaking through Judge Mack, further elucidated and applied the distinction the Supreme Court had drawn. *New York Central Sec. Corp.* v. *United States*, 54 F.2d 122 (S.D.N.Y. 1931). That suit attacked an order authorizing NYC to acquire control by lease of various railroads in which it was a majority and plaintiff a minority stockholder; the leases provided for payment of guaranteed annual dividends directly to the minority stockholders, with nothing paid to the lessors themselves. Judge Mack ruled that under the *Pittsburgh & West Virginia* decision plaintiff's interest as a stockholder in the lessee did not invest it with standing but

its claimed injury as a stockholder in the lessors did, since that interest "is not merely derivative through its ownership of stock, but is an independent injury to itself as a member of a class created by the leasing agreements between lessors and lessee." 54 F.2d at 126. The Supreme Court agreed, 287 U.S. at 19-20. This same line of distinction was drawn in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957), where the Court held that common stockholders of Alleghany Corporation did not have standing to obtain judicial review of I.C.C. orders authorizing a merger of railroads in whose common parent Alleghany was a large stockholder and determining that Alleghany was a carrier subject to regulation by the Commission and therefore exempted from the Investment Company Act, but that they did have standing to attack a further order in the exercise of the Commission's asserted jurisdiction authorizing Alleghany to issue a new convertible preferred stock which plaintiffs claimed would unfairly dilute their stock interests in Alleghany.

Plaintiffs' case is governed by *Pittsburgh & West Virginia* and the rulings in *Breswick* with respect to the merger and to the status of Alleghany. The PRR-NYC merger as proposed by the parties did not involve any transaction relating to NH. While it threatened injury to NH, it posed no "individualized threat," 353 U.S. at 173, to plaintiffs as distinguished from all other claimants against the NH estate. Protection of the interests of plaintiffs and all other NH creditors and stockholders was and is the responsibility of the Trustees in the § 77 proceeding. Trustees in such a proceeding have all the powers of a trustee under § 44 of the Bankruptcy Act, § 77(c)(2), and thus are "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition . . .," § 70(a). Any rule permitting creditors or stockholders of a railroad affected by a proposed merger

of other lines to interpose themselves in the main ring of the merger proceeding would be impracticable from an administrative standpoint. Such a proceeding is sufficiently complex without the Commission or a reviewing court also having to choose among the conflicting views of security holders of third lines, some of whom regarded the merger with favor, others of whom opposed it and still others who wanted conditions of varying sorts. A carrier claiming to be adversely affected by a merger must speak at this stage with a single voice; what the voice shall say is normally determined in the case of a solvent carrier by its board of directors, and in the case of an insolvent one by its trustees subject to instruction by the reorganization court. While it is true in a pragmatic sense that the transaction may affect "the interests of investors" in the third carrier, it does so only in the way that every significant transaction does, and as the important one in the *Pittsburgh & West Virginia* case surely did. The Supreme Court's requirement is more stringent; in order for investors to have standing the order under attack must not merely affect but "deal with" their interests—their securities, rights, priorities and so on—as did the order in the *New York Central Securities* case and the order authorizing Alleghany to issue convertible preferred stock, or as the instant order did with respect to the stockholders of PRR and NYC.

Plaintiffs contend that even if this be so, they have standing because the Trustees of NH have disabled themselves from effectively representing the bondholders' interests. This is claimed to be true because the agreement of the Trustees with NYC and PRR for inclusion of the properties of NH in the Transportation Company, initially embodied in a Memorandum dated December 22, 1964 and February 5, 1965, made it a condition of the purchaser's obligation to close that the former "shall not

have made or filed any further statement, stipulation or other document in the pending Penn-Central merger proceedings before the I.C.C., or any judicial review thereof, other than in connection with (a) a position relating to the New Haven taken by any other party, or (b) a failure of the Examiners of the I.C.C. to find either that the New Haven should be included in such merger or that jurisdiction is to be retained for later determination of any petition by the New Haven for such inclusion, provided, however, that any such statement, stipulation or other document made or filed shall be consistent with the provisions and intent of this memorandum and the definitive agreement provided for herein."[4] This, plaintiffs say, and the Trustees do not dispute, required the latter to abandon their earlier insistence on actual inclusion as a condition precedent.

There is indeed authority, not cited to us, that an administrative agency may consider a stockholder as speaking on behalf of a corporation if it finds that the corporation has been prevented from doing so by another stockholder's abuse of power, just as a court of equity may do in a derivative action. *W. R. Grace & Co.*, v. *CAB*, 154 F.2d 271 (2d Cir.), cert. granted sub nom. *Pan American Airways Corp.* v. *W.R. Grace & Co.*, 328 U.S. 832 (1946), dismissed as moot, 332 U.S. 827 (1947). But that case cannot avail the plaintiffs here. Although the Memorandum of Understanding was announced by the Trustees and filed with the reorganization court on March 31, 1965[5] and was annexed to the Trustees' brief filed with the Commission on August 16, 1965 replying to exceptions to the hearing examiners' report, no complaint as to the Trustees' abandonment of their insistence on inclusion as a condition precedent reached the Commission's ears until the Gruss petition of July 11, 1966. If we assume the *W.R. Grace* decision to be sound law, a

person desiring this extraordinary relief from an agency must act promptly; otherwise there would be no end to administrative proceedings already unduly prolonged. Moreover, and even more decisive, whatever be the case as to a solvent corporation, there can be no occasion for having an administrative agency determine whether trustees shall be ousted from speaking for a bankrupt estate; power to instruct them or to turn over the job to someone else is vested exclusively in the bankruptcy court.

Beyond all this, plaintiffs are precluded from advancing many if not all the contentions that were presented to us by the rule that a court reviewing administrative action will not, indeed save in extraordinary circumstances may not, consider a ground that was not timely presented to the agency. *Unemployment Compensation Comm'n of Alaska* v. *Aragon,* 329 U.S. 143, 155 (1946); *FPC* v. *Colorado Interstate Gas Co.,* 348 U.S. 492 (1955). While the Interstate Commerce Act does not contain the provision on that score found in many federal regulatory statutes, "the law is substantially the same whether or not it happens to be embodied in such a statutory provision," 3 Davis, Administrative Law Treatise § 20.06, p. 92 (1958). The Supreme Court applied the usual principle to the Interstate Commerce Act in *United States* v. *L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33 (1952). The practical necessity for generally barring a party from obtaining judicial review of questions that were not properly presented to the agency could hardly be better illustrated than by the belated presentation of plaintiffs' claims in this complicated case which has been pending more than four and a half years.

Although the Trustees of NH had initially sought inclusion as a condition precedent, no such contention was before the Commission when it made its report of April 1966, and plaintiffs knew or ought to have known this. Any entitlement of the plaintiffs to the relief they now

seek must therefore rest on Gruss' petition for reconsideration, compare *United States* v. *Great Northern Ry.*, 343 U.S. 562, 567 n. 3 (1952). That would not suffice if the Commission refused to consider the petition on the basis that the issue had been decided in the initial report when no one was seeking inclusion of NH as a condition precedent, and that it was too late to raise the issue on reconsideration; if the Commission is to be able to perform the tasks assigned it by Congress, it must have authority to set a date after which arguments, save those which could not have been made before, must end. The supplemental report of the Commission, see note 3 *supra*, can be read as having said just that. But even if we read the report more generously to the plaintiffs, the only issue which Gruss presented to the Commission was that inclusion be made a condition precedent to consummation. Gruss never made any suggestions, such as those here advanced, that NH should receive interim protection similar to that accorded the Erie-Lackawanna, Delaware & Hudson and Boston & Maine, or that consummation be made contingent on the Transportation Company's accepting all subsequent losses of NH or so much of them as could be shown to stem from diversion of freight revenues by the merged company. Hence the only issue which is open on any view is the refusal to postpone consummation for the long period that will almost necessarily be required to dispose of the inclusion application, complicated as that is by the attendant problems under § 77 of the Bankruptcy Act, and on this the Commission acted reasonably and within its powers.[6] For this further reason as well as plaintiffs' lack of standing, there is no occasion to discuss their contentions with respect to *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954), beyond saying it would be premature to conclude at this juncture either that the *St. Joe* decision necessarily precludes ultimate inclusion of NH in

the Transportation Company or that the Transportation Company must be required to protect NH, apparently, on plaintiffs' view, so long as railroad operation continues, if *St. Joe* should turn out to have that result.

Summary judgment will therefore be entered dismissing the complaints. Treating the requests for a temporary injunction as embracing the lesser relief of a stay of consummation pending appeal to the Supreme Court in the event of a denial, we cannot conscientiously grant this under the criteria laid down in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958) and *Eastern Air Lines, Inc.* v. *CAB*, 261 F.2d 830 (2d Cir. 1958), which we summarized and applied in the *Erie-Lackawanna* action. Moreover, the merger is already stayed until January 1967, and if plaintiffs should appeal to the Supreme Court, they have ample time to apply there for a stay.

It is so ordered

HENRY FRIENDLY
U.S.C.J.

RICHARD LEVET
U.S.D.J.

EDWARD WEINFELD
U.S.D.J.

November 28, 1966.

Appendix A

FOOTNOTES

1. Since the bonds were not deposited there is no way of telling how many of these authorizations remain valid.

2. The agreement provides, § 9.2, that the purchase price shall be increased by:

> "An amount equal to the aggregate of the deficits in the New Haven's freight service net railway operating income for the calendar years subsequent to December 31, 1964 and for the partial year in which the Closing Date occurs, but in no event for any period subsequent to December 31, 1967; *provided, however,* that for the purposes of this Section 9.2.4, (a) any such deficit for a calendar or partial year shall be limited to $1,750,000, (b) the aggregate of such deficits shall be limited to the aggregate of the net proceeds from all sales or other dispositions of Property made by the New Haven during the period from January 1, 1965 to the earlier of the Closing Date or December 31, 1967, and (c) the amount of any such deficit shall be computed in a manner consistent with the manner in which such deficit was determined by the Trustees for their annual reports for the New Haven to the I.C.C."

3. The NH Bondholders Committee did not participate in the PRR-NYC merger proceeding in any way. Not until July 11, 1966, did Gruss & Son apply for leave to intervene for the purpose of filing a petition for reconsideration asking the Commission to modify Condition No. 8 "to require inclusion of the New Haven at the time of and as a condition precedent to merger of the Pennsylvania and the Central, holding further hearings thereon, and postponing consummation of said merger to permit the completion of such hearings and the inclusion of the New Haven at the time of and as a condition precedent to said merger." In its report on reconsideration the Commission dealt with this under the heading "Preliminary Matters," saying, 328 I.C.C. at 306-07:

> "Gruss seeks intervention to press for the immediate inclusion of NH in the merged system. In the prior report, we acknowledged that inclusion of NH operations raises many problems, including those related to section 77 of the Bankruptcy Act, and that their resolution would require time and much personal endeavor on the part of all those interested, thus precluding immediate inclusion. By October 27, 1966, however, the parties concerned are to file for our approval, an inclusion plan covering the terms and conditions agreed upon, and in the absence of such a filing, we have the jurisdiction reserved to set the terms and conditions ourselves. It is therefore not possible to grant the immediate relief

which Gruss seeks. But, as concluded in the prior report, withholding the public benefits otherwise obtainable through the merger is not warranted.

"Although the relief now requested is not justified, Gruss, as a substantial investor in NH securities, undoubtedly has an interest in the ultimate disposition of the bankrupt carrier's operations. Therefore, to obviate the need for another petition in order to participate in the inclusion proceeding, we will permit Gruss to intervene now and become a party herein, but deny the specific relief sought in its petition, without prejudice to its seeking such relief as it deems warranted in any proceeding involving the inclusion of NH's operations."

The Commission plausibly argues that this did not make Gruss & Son a party to the proceeding leading to the order here sought to be reviewed but only in the subsequent "inclusion" proceeding which, by order dated November 9, 1966, has been set for prehearing conference on December 19, 1966, and for hearing on January 16, 1967, in which the Committee has now sought to intervene. However, the *Pittsburgh & West Virginia* opinion makes it plain that even if Gruss was an intervenor, that would not be decisive in his favor.

[4] Substantially the same provision is now § 11.7 of the definitive agreement dated April 21, 1966, as amended October 4, 1966.

[5] We were advised by counsel for the NH Trustees that announcement was delayed until then because of the imminence of the hearing examiners' report, which was filed March 29, 1965. Counsel also advised that copies of the memorandum were sent to all persons on the court's service list, including the Committee.

[6] Gruss' petition for reconsideration did claim that the duration of the inclusion proceeding would be greatly shortened if the purchase agreement, instead of providing for sale free of the lien of the first and refunding mortgage, were modified so that the Transportation Company would take over the properties subject to that lien, which "could then be satisfied in the bankruptcy proceedings by the payment to the bondholders of its equitable equivalent. . . ." We do not understand how the Commission could delegate to the bankruptcy court its responsibility to pass on the consideration the Transportation Company is to pay, see *Schwabacher* v. *United States, supra,* 334 U.S. at 197-98; the Commission is bound to insure that the merged company is not burdened with an excessive obligation toward NH just as much as to see that NH is adequately compensated. If the proposal is more feasible than we now discern, Gruss is free to raise it in the inclusion proceeding.

WEINFELD, D. J. (concurring)

I join in the opinion of the Court. However, I deem it appropriate to note an additional distinction between this case and *Erie-Lackawanna R.R. v. United States.*[1] In the *Erie* case the Commission found that the public interest required protection of the three carriers against the adverse effects of the merger,[2] and as a condition of consummation imposed specific protective terms[3] which it subsequently revoked ex parte, in my view without adequate supporting findings, as to one condition and left for future determination as to others.[4] The terms and conditions as originally delineated by the Commission were a sine qua non of the merger.

In the instant case the Commission found that the overriding public interest requires the inclusion of New Haven, but left to the parties themselves the particular terms and conditions of the inclusion, subject to approval by the Commission and the Reorganization Court.[5] Should the parties fail to agree, the Commission has retained jurisdiction to impose terms and conditions and the consummation of the merger by Penn-Central constitutes assent thereto; in addition, the matter is still subject to approval by the Reorganization Court.[6]

The Commission recognizes that the Penn-Central merger "could undoubtedly wean substantial traffic away from New Haven and leave that already moribund carrier in

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[1] 66 Civ. 2860, S.D.N.Y., October 4, 1966.

[2] 327 I.C.C. 475, 529, 532 (1966).

[3] *Id.* at 532, 547 (1966).

[4] 328 I.C.C. 329 (1966).

[5] 327 I.C.C. 527, 553 (1966).

[6] *Ibid.*

perhaps an irretrievable situation."[7] Inclusion of New Haven to assure adequate freight and passenger service reflects the overriding public interest.[8] The future determination of the particular terms thereof will not affect the public interest, although to be sure security holders, creditors and others who have a financial stake in New Haven's existence will be affected. If creditor and other interests are dissatisfied with the terms and conditions worked out by the Reorganization Trustee, there is the double-barrelled protection by the Commission and the Reorganization Court. And even if, unrealistically, we assume that both the Commission and the Reorganization Court will foist upon these plaintiff bondholders terms detrimental to them,[9] it does not follow that the public interest served by the New Haven will be adversely affected—on the contrary, not to include the Line in the merger may not only lead to its demise and the consequent elimination of its service to the public, but may well be totally destructive of the financial interest of some classes who have a stake in its survival.

In *Erie,* on the other hand, the terms and conditions left for future determination had, in my opinion, a vital bearing upon the public interest. Those terms, according to the Commission, were essential for the protection of the smaller carriers, the shippers, passengers and the communities they serve. By revoking them without adequate findings to support the change of position, the Commission undermined its own finding that the merger was consistent with the public interest only if the safeguards were provided; by its action it brought into question the

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[7] 327 I.C.C. 522 (1966).

[8] 327 I.C.C. 526-27 (1966).

[9] Cf. § 77(e) of the Bankruptcy Act, 11 U.S.C. § 205(e); *St. Joe Paper Co.* v. *Atlantic Coast Lines,* 347 U.S. 298 (1954).

validity of its order authorizing immediate consummation of the merger. By leaving for further consideration the terms and conditions it previously held essential to consummation, it exposed the three carriers during the period the matter would be under consideration to the same adverse factors it found militated against the merger, absent adequate protective terms. In that circumstance I questioned the power of the Commission under section 5(2)(b) of the Act[10] to defer until after consummation the determination of terms "found essential to validate this merger."[11]

EDWARD WEINFELD
U.S.D.J.

November 28, 1966.

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[10] 49 U.S.C. § 5(2)(b).

[11] *Erie-Lackawanna R.R.* v. *United States, supra* note 1, at p. 14.

APPENDIX B

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 16th day of September, 1966.

Finance Docket No. 21989

PENNSYLVANIA RAILROAD COMPANY — MERGER — NEW YORK CENTRAL RAILROAD COMPANY

Finance Docket No. 21990

PENNSYLVANIA RAILROAD COMPANY STOCK ISSUANCE

Further consideration to the matters and things involved in these proceedings having been given, and the Commission on the date hereof having made and filed its report on reconsideration, which report and the prior report in the proceedings, 327 I.C.C. 475, are made a part hereof:

It is ordered, That the Norwich and Worcester Railroad Company be, and it is hereby, permitted to intervene and become a party to the above-described proceedings for the purpose of seeking inclusion therein in accordance with its petition for inclusion filed July 8, 1966;

It is further ordered, That the Norfolk and Western Railroad Company and Oscar Gruss & Son be, and they are hereby, permitted to intervene and become parties herein for the limited purposes set forth in the said report on reconsideration, and that the petitions of these two

interveners be, and they are hereby, denied in all other respects;

It is further ordered, That the report and order of April 6, 1966, 327 I.C.C. 475, be, and it is hereby modified in accordance with the finding in said report on reconsideration;

It is further ordered, That the matter of modification of appendix G to said report of April 6, 1966, and the question of indemnification for capital loss as discussed in the attached report on reconsideration be, and they are hereby, set for hearing at a date and place and before a hearing officer to be announced; and

It is further ordered, That as hereby modified, said report and order of April 6, 1966, shall remain in full force and effect.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX C

Provisions of Judicial Code (Title 28 U.S.C.) Relating to Judicial Review of Commission Order

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. As amended Aug. 30, 1964, Pub.L. 88-513, § 1, 78 Stat. 695.

§ 1398. Interstate Commerce Commission's orders

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub.L. 88-513, § 2, 78 Stat. 695.

§ 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as mem-

bers of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the

rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. As amended June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201.

§ 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States. As amended May 24, 1949, c. 139, § 115, 63 Stat. 105.

§ 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. As amended May 24, 1949, c. 139, § 116, 63 Stat. 105.

§ 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or

in part, the operation of the order pending the final hearing and determination of the action.

§ 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Pertinent Provisions of Section 5 of the Interstate Commerce Act (Title 49 U.S.C. § 5)

§ 5. Combinations and consolidations of carriers

Pooling; division of traffic, service, or earnings

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any

portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire

control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving

and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

* * * *

Supplemental orders by Commission

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

Pertinent Provisions of the Administrative Procedure Act

§ 5(a), 5 U.S.C. § 1004(a)

Notice of hearing and issues

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

§ 5(b), 5 U.S.C. § 1004(b)

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the

parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 7(c), 5 U.S.C. § 1006(c)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for moneys or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 8(b), 5 U.S.C. § 1007(b)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

• • • •

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 10, 5 U.S.C. § 1009

Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Appendix C

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determina-

tions the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Bankruptcy Act

§ 77(b)(c)(d)(e)(f)

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with

another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders

of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section [Aug. 27, 1935]) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided,* That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every substitute or additional trustee or trustees. The judge shall in his discretion con-

firm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracks, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subsection (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a

satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice publish in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20 (a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees, for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificates shall have such lien on the property of the debtor and shall be entitled to such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties,

debts or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalties, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of authorizing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to

the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized in accordance with the provisions of section 1 of the Interstate Commerce Act as amended, or until such operation pursuant to this paragraph is otherwise lawfully terminated. During any such operation, the lessor shall be deemed to be a carrier subject to all applicable provisions of the Interstate Commerce Act, as amended, and shall be entitled to receive just, reasonable, and equitable divisions of rates, fares, or charges applicable to the transportation of persons or property over its line or lines of railroad and the lines of the lessee or other carriers, and the provisions of section 15(6) of the Interstate Commerce Act, as now or hereafter amended, shall apply to said divisions whether or not joint rates covering such transportation have been established.

(7) The judge shall promptly determine and fix a rea-

sonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classifications unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid

out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by the parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeal from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons

designated or their number, as the public interest may require: *Provided, however,* That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than intervenors and the manner of giving such notice.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan

shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party, to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to

the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall

transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action acepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and

materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the

creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration

of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or

order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and coveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities

issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof.

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No. 1060

In the Supreme Court of the United States

OCTOBER TERM, 1966

OSCAR GRUSS & SON,

APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM
of
APPELLEES RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

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March 13, 1967

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON,
APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, move, pursuant to paragraph 1(c) of Rule 16 of the Rules of this Court, that the judgment of the district court be affirmed on the ground that the questions raised are so unsubstantial as not to require further argument.

STATEMENT

This is an appeal from the summary judgment of a three-judge district court[1] dismissing appellant's com-

[1]The United States District Court for the Southern District of New York is referred to herein as the "district court". The plaintiffs in the action before the district court were Oscar Gruss & Son ("Gruss" or "appellant") and The New York, New Haven and Hartford Railroad Company Bondholders' Committee ("Committee"). In addition to the United States, the Interstate Commerce Commission ("Commission") was a defendant. Intervening defendants were Richard Joyce Smith and William J. Kirk, Trustees

plaint which sought to set aside orders of the Commission which approved the merger of Penn and Central upon condition that the New Haven be included.[2] Appellant sought to prevent consummation of the merger until the New Haven's inclusion is actually accomplished.[3] The district court unanimously found that Gruss lacked standing to bring the action (JS A-8) and that, even if such standing existed, the complaint was without merit. (JS A-14)

On March 9, 1962, Penn and Central filed a joint application with the Commission seeking authority to merge under §5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)). The Trustees thereupon petitioned the Reorganization Court for authority to seek to intervene in the Penn-Central merger proceedings, and to seek inclusion of the New Haven in the proposed trans-

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of the property of The New York, New Haven and Hartford Railroad Company, Debtor ("Trustees"; the Debtor being referred to as "New Haven"), The Pennsylvania Railroad Company ("Penn") and The New York Central Railroad Company ("Central"). The survivor upon merger of Central into Penn is referred to as "Penn-Central".

The United States District Court for the District of Connecticut, in which the pending proceedings for the reorganization of the New Haven under Section 77 of the Bankruptcy Act (11 U.S.C. §205) were commenced on July 7, 1961, is referred to as the "Reorganization Court".

Appellant's Jurisdictional Statement and appendices thereto are referred to as "JS", followed by appropriate page references.

[2]Six appeals relating to other aspects of the same orders of the Commission, as well as the orders themselves, were argued before this Court on January 9 and 10, 1967, *Baltimore & Ohio Railroad Company, et al.* v. *United States, et al.* (October Term, 1966, Nos. 642, 680, 691, 813, 814 and 815).

[3]Appellant's action in the district court and a similar one brought by the Committee were consolidated. The Committee has not appealed.

action pursuant to §5(2)(d) (49 U.S.C. §5(2)(d)).[4] The petition was duly noticed and after a hearing, at which no one appeared in opposition, authority was granted on June 19, 1962. (R. 511)

The Commission's hearings on the proposed merger began in August, 1962.[5] The Trustees participated throughout the Commission proceedings, taking the position that the public interest required that approval of the merger be conditioned upon inclusion of the New Haven.[6] Until June 1, 1964, Penn and Central actively opposed inclusion of the New Haven under any circumstances and in any form. In a brief then filed with the hearing examiners, Penn and Central indicated that, if the Commission determined that the New Haven would be adversely affected, they might accept a condition requiring Penn-Central to operate the New Haven's freight lines for the account of the New Haven or to participate in other arrangements short of the New Haven's inclusion in Penn-Central. In their brief of

[4]On March 5, 1962, the Trustees had filed with the Reorganization Court an initial six months' report stating, *inter alia*, that:

". . . even with the passenger service problem solved, operations of the railroad streamlined and provision for deferred maintenance, service on the New Haven lines cannot be contemplated as a permanent continuing function unless it is merged with a Trunk Line railroad. This, in our opinion, must not merely be a physical interconnection, but a full and complete corporate merger. Only then can the disadvantages inherent in New Haven's terminal characteristics be overcome."

[5]Hearings were held on 128 days through October 2, 1963, and on September 16, 1964.

[6]The Trustees' position was based upon the contention that merger of Penn and Central would so substantially divert freight traffic that the New Haven would be unable either to survive as an independent railroad or to be reorganized. Appellant refers to the Trustees' evidence that the New Haven's loss of freight revenue would exceed $9.5 million annually (JS 9); it fails to note that such estimated loss represented *gross* freight revenue and that the Trustees estimated that the annual net loss would be approximately $5 million.

the same date, the Trustees contended that approval of the merger should require that the New Haven's operations be included in Penn-Central, and then asked that such inclusion be made a condition precedent to consummation of the merger.[7]

Shortly after the briefs were filed, the Trustees, Penn and Central commenced negotiations concerning possible terms for inclusion of the New Haven in Penn-Central. (R. 512) These resulted in a memorandum of understanding, the essential terms of which were agreed to on December 22, 1964, but which, following the resolution of additional details, was executed and delivered after February 5, 1965. In the negotiations, Penn and Central would not agree to delay consummation of their merger for the period required to complete proceedings under the Bankruptcy Act and Interstate Commerce Act necessary to accomplish the New Haven's inclusion. The understanding finally reached provided that, for the consideration and on the terms specified, Penn-Central, following merger, would purchase substantially all of the New Haven's assets as soon as all necessary administrative and judicial approvals had been obtained.[8]

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[7]Appellant incorrectly implies that the Trustees took this position from the time of their intervention in the Penn-Central proceedings. (JS 8-9) The Trustees' petition to the Reorganization Court for authority to seek intervention and inclusion and their petitions to the Commission in June, 1962 for intervention and inclusion do not speak of a condition precedent.

[8]Among other things, the memorandum of understanding, *which stated that it did not constitute a contract,* provided for:

(1) the conveyance to Penn-Central of substantially all of the New Haven's assets, other than current assets, free and clear of all system mortgage liens;

(2) a purchase price to be paid essentially in common stock and bonds of Penn-Central, plus cash and assumption of various liabilities;

The Trustees agreed with Penn and Central not to make the understanding public prior to issuance of a recommended report by the hearing examiners. The examiners' report was issued on March 29, 1965. Approval of the merger was recommended upon the condition, *inter alia,* that the New Haven's freight service be included, but the examiners did not recommend that such inclusion be a condition precedent to consummation of the merger.

Promptly after service of the examiners' report, the Trustees filed with the Reorganization Court a report on their negotiations with Penn and Central[9] and attached a copy of the memorandum of understanding. (R. 512) The report summarized the portions of the memorandum of understanding which stated that the memorandum "is not intended to constitute a contract" and that a "definitive agreement will be prepared as promptly as possible consistent with" the memorandum. The memorandum of understanding had been released to the public at that time.

As permitted by the Commission, exceptions to the examiners' report were filed in July, 1965. On July 9, 1965, appellant's counsel wrote to the Commission stating that the recommendation of the examiners relating to acquisition by Penn-Central of the New Haven's freight operations "is entirely fair and reasonable" and

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(3) a procedure for adjusting the purchase price to reflect transactions prior to inclusion, such as sales and purchases of property;

(4) certain conditions to Penn-Central's obligation, including the requirement that the Trustees take no position regarding the merger inconsistent with the memorandum of understanding; and

(5) the preparation of a definitive agreement consistent with the terms of the memorandum of understanding.

[9] Report of Trustees Concerning Proposed Sale of the Debtor's Assets to Pennsylvania New York Central Transportation Company, dated April 7, 1965.

that Gruss, having no objection thereto, has not sought intervention in the merger proceedings. (App. A-1) The Trustees replied to the exceptions, attaching a copy of the memorandum of understanding (R. 512), and urged the Commission to adopt the examiners' recommendations. Oral argument, at which the Trustees again fully supported the examiners' report, was heard by the full Commission in October, 1965.

As contemplated by the memorandum of understanding, the Trustees, Penn and Central executed an agreement on April 21, 1966, which set forth in detail the terms and conditions for the New Haven's inclusion in Penn-Central, subject to approval by the Commission and the Reorganization Court.[10] On the same day, the agreement was filed with the Reorganization Court and made public.

On April 27, 1966, the Commission issued its report and order, dated April 6, 1966, approving the merger subject, *inter alia,* to the New Haven's inclusion. (327 I.C.C. 475) Contrary to the examiners' recommendations, the Commission required that Penn-Central assume the New Haven's passenger service as well as

[10]The April 21 agreement provides that Penn-Central will (with certain minor exceptions) bear costs after December 31, 1963 relating to the operations of the New Haven incurred for (a) payments on equipment obligations; (b) payments for the acquisition of property or for additions and betterments to property; and (c) certain casualty losses. (R. 515)

Penn-Central is also required to reimburse the New Haven for deficits in freight service net railway operating income to the extent of $1,750,000 per year or partial year for the years 1965 through 1967. (R. 515)

In addition, the Trustees are not required to account to Penn-Central for shrinkage in the New Haven's assets by reason of depreciation, except in the case of property acquired since December 31, 1964. The book charge to operating income of the New Haven for depreciation exceeded $8.7 million in each of the years 1964 and 1965 and is expected to be of approximately the same magnitude in each year until closing. (R. 515)

its freight operations. The Commission provided that the merger could be consummated forthwith, directing that a plan for the New Haven's inclusion be filed by the Trustees, Penn and Central by October 27, 1966. Jurisdiction was reserved by the Commission to provide for inclusion "upon such fair and equitable terms and conditions" as it might impose, subject to Reorganization Court approval. (327 I.C.C. at 553) On October 4, 1966, the April 21, 1966 agreement was amended to conform to the Commission's report.[11] (R. 514)

On July 11, 1966, appellant, for the first time, petitioned the Commission for leave to intervene in the merger proceedings, and sought reconsideration of the April 6, 1966 report. Appellant asked the Commission to stay consummation of the merger pending further hearing, and requested a condition which would require inclusion of the New Haven as a condition precedent of the merger. (JS 12-13)

Various other persons also sought reconsideration and a delay in consummation of the merger. On July 29, 1966, the Trustees replied to these petitions for reconsideration.[12] The Trustees were particularly concerned by the requests for delay and stressed that the New Haven could not afford to run the risk that by reason of delay the merger might abort and thus lead to the New Haven's liquidation. The Trustees emphasized their intention to seek the earliest possible inclusion of the New Haven in accordance with their agreement with Penn and Central. With regard to appellant's position, the Trustees said that they had:

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[11]The amendment also made other changes designed to expedite inclusion.

[12]Contrary to appellant's implication (JS 12-13), the Trustees did not oppose appellant's petition to intervene in the merger proceedings.

". . . ceased to press [for the condition precedent] in favor of firm undertakings for New Haven's inclusion, coupled with appropriate provision for protection against delay. The Trustees are wholly convinced that the interests of the New Haven Estate are now best served by the quickest possible consummation of the merger, to be followed by prompt inclusion proceedings."

On September 16, 1966 the Commission denied appellant's petition for reconsideration, granting it the right to participate in the proceedings for the New Haven's inclusion which were expected to commence subsequent to October 27, 1966.[13] (328 I.C.C. 304)

Gruss filed its complaint in this case on October 18, 1966. A hearing was held by the district court on November 15, and its decision was rendered on November 28.[14]

DISCUSSION

Appellant's jurisdictional statement confines its discussion of alleged error by the district court to the determination that appellant did not have standing to institute proceedings for judicial review of the Commission's orders.[15] In the district court, the Trustees

[13]The district court noted that the Commission "plausibly argues that this did not make Gruss & Son a party to the proceeding leading to the order here sought to be reviewed but only in the subsequent 'inclusion' proceedings . . . ." (JS A-17, note 3)

[14]Judge Weinfeld, who joined in the district court's opinion, also filed a separate opinion dealing with his dissent in *Erie-Lackawanna R.R.* v. *United States,* 259 F. Supp. 964 (S.D. N.Y. 1966). The subsequent appeals in that case to this Court are referred to in note 2, *supra.*

[15]The district court's decision on the merits is one of the questions presented by appellant. (JS 7, ¶6) However, appellant has failed to include in its Jurisdictional Statement any reasons why the decision on the merits raises a question so substantial as to require plenary consideration for its resolution. See Rule 15, ¶1(f) of the Rules of this Court.

opposed appellant solely on the merits of its contentions. Other defendants took the position that appellant did not have standing. The district court was clearly correct in finding no merit in appellant's complaint and that appellant lacked standing.

1. For nearly three years prior to its petition for intervention in the merger proceedings, appellant was a party to the New Haven reorganization proceedings before the Commission.[16] In addition, appellant sought on June 7, 1965, to intervene in the Reorganization Court proceedings, alleging that it might be materially and adversely affected by a disposition of the New Haven's properties pursuant to the memorandum of understanding. (App. A-7 – A-8) The Reorganization Court denied intervention, but directed that appellant be added to the list of those entitled to notice of all matters assigned for hearing, emphasizing that even though appellant was not a party, it had a statutory right to be heard on all questions arising in the reorganization proceedings.[17] (App. A-9 – A-10)

At no time prior to the Commission's report and order of April 6, 1966, did appellant seek to participate in the merger proceeding or to have the Reorganization Court instruct the Trustees with regard to their position in that proceeding.

In its decision, the district court gave full consideration to appellant's contentions that the Trustees, by not insisting on the condition precedent, disabled themselves from effectively representing the bondholders.

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[16]On July 22, 1963, appellant was permitted to intervene in the Commission's proceeding in Finance Docket No. 21669, in which New Haven reorganization matters before the Commission are conducted.

[17]Section 77(c)(13) of the Bankruptcy Act (11 U.S.C. §205 (c)(13)).

(JS A-11 – A-13). Even if appellant's contentions were correct, and assuming the condition precedent issue had substance, appellant had sufficient knowledge of the existence of the memorandum of understanding to have acted in a timely fashion before the Commission issued its report and order of April 6, 1966.

Appellant's position that "[t]he earliest and the only feasible course of self-protection available to Gruss is the one he has taken" (JS 26) and that it could not have acted prior to filing its petition for reconsideration with the Commission in July, 1966 (JS 19), may be contrasted with the following: on June 7, 1965, in its petition to intervene in the Reorganization Court, appellant alleged as a ground that it might be materially and adversely affected by the memorandum of understanding (App. A-8); and on July 9, 1965, in its letter to the Commission with a copy to the Trustees (App. A-2 –A-3), appellant characterized as merely "one minor suggestion" its own request for a condition having the elements of a condition precedent, and stated that it had no objection to the examiners' recommendations, which did not provide for a condition precedent. (App. A-2)

In its letter of July 9, 1965, appellant also made clear to the Commission that its "one minor suggestion" was to require assumption by Penn-Central of responsibility for the New Haven's operations on the effective date of the merger, *only* "if prior thereto the parties have not come to an agreement as to terms" (App. A-2), and advised the Commission that the suggestion was "consistent with *the Examiner's proper concern that New Haven interests should not be placed in a position to delay indefinitely the Pennsylvania-New York Central merger.*" (emphasis added) (App. A-2)

The district court pointed out that "[a]lthough the Trustees of NH had initially sought inclusion as a con-

dition precedent, no such contention was before the Commission when it made its report of April 1966, and plaintiffs knew or ought to have known this." (JS A-13) Appellant's petition of June 7, 1965, for intervention in the Reorganization Court establishes that it had actual knowledge of the memorandum of understanding some ten months before the Commission issued its April 6, 1966 report and order. Appellant knew or ought to have known, by the Trustees' reply in August, 1965 to the exceptions taken to the examiners' report and by their oral argument before the Commission in October, 1965, that the Trustees were supporting the examiners' report.

In order for the district court to have found that an issue had been properly raised before the Commission and, consequently, was open to review, it had to read the Commission's report of September 16, 1966 as generously as possible to appellant. (JS A-14) On this basis the district court found that "the only issue which Gruss presented to the Commission was that inclusion be made a condition precedent to consummation." (JS A-14) Such issue must necessarily be based upon the adverse impact on the New Haven of a diversion of traffic to Penn-Central. However, as the district court pointed out:

> "The Commission is not under a mandate to protect against all diversion as a condition to the grant of immunity under the antitrust laws, as plaintiffs seem to think; it is concerned with diversion only as this bears on the 'public interest,' and that concept 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities,' *New York Central Sec. Corp.* v. *United States,* 287 U.S. 12, 25 (1932), with investor interest an element only insofar as its protection will serve to attain these goals." (JS A-7 – A-8)

Appellant has made no showing that the Commission could not adequately protect the interests of security holders in the proceedings which must be held under §5(2) of the Interstate Commerce Act and §77 of the Bankruptcy Act in order to determine the terms and conditions of the New Haven's inclusion. These proceedings are now in progress. A pre-hearing conference, at which appellant entered its appearance, was held by the Commission on December 19, 1966, and hearings commenced on January 16, 1967, with appellant an active participant.

The contentions made by appellant in the district court can be made in the inclusion proceedings and can be considered in an orderly fashion by the forum charged with the function of giving them consideration. The district court said:

> "We would agree with Judge Anderson's statement, in authorizing the Trustees to proceed before the Commission, that it is for that agency 'to determine in passing upon the plan for the inclusion whether these provisions [negotiated by the Trustees] adequately protect the estate for any possible losses in the time between consummation of the Penn-Central merger and inclusion of the New Haven, or whether additional terms are required.'" (JS A-8)

For the reasons stated above, the district court properly concluded that, in denying appellant's petition for reconsideration, "the Commission acted reasonably and within its powers." (JS A-14)

2. Appellant's argument on standing is based on *The Chicago Junction Case,* 264 U.S. 258, and the allegation that the district court misread *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479 and *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151. (JS 19)

In *Breswick,* this Court found that the common stockholders did have standing, "by virtue of the threatened financial injury." (353 U.S. at 160) Appellant, however, cannot bring itself within the *Breswick* concept of such a threat. As the district court pointed out: "The PRR-NYC merger as proposed by the parties did not involve any transaction relating to NH. While it threatened injury to NH, it posed no 'individualized threat,' 353 U.S. at 173, to plaintiffs as distinguished from all other claimants against the NH estate." (JS A-10)

Appellant argues that an "individualized threat" is unnecessary for its standing because *Pittsburgh & West Virginia* made an exception in the instance of "orders entered in cases of reorganization . . .". (281 U.S. at 487) The Commission's order which appellant seeks to review is not, however, an order entered in a reorganization case. For the *Pittsburgh & West Virginia* exception to apply to appellant, the order must " 'deal with' their interests — their securities, rights, priorities and so on — as did the order in the *New York Central Securities* case and the order authorizing Alleghany to issue convertible preferred stock, or as the instant order did with respect to the stockholders of PRR and NYC." (JS A-11) It is the current proceeding for the New Haven's reorganization and determination of the terms of its inclusion, in which appellant is participating, which can lead to an order of the nature that appellant now claims the right to have reviewed.

Finally, appellant contends that its standing is, in any event, implied from its appearance before the Commission, relying on the *The Chicago Junction Case, supra.* As stated in *Seatrain Lines* v. *United States,* 152 F. Supp. 619, 622 (D.Del 1957), *aff'd,* 355 U.S. 181:

> "Early in the history of the law of standing there was an implication that intervention before the Commission conferred standing upon one to institute an action to challenge the order of the Commission [footnote citing *The Chicago Junction Case* omitted]. This implication has been completely and utterly destroyed by later pronouncements of the Supreme Court."

That this is the correct statement of the law is made clear by *Sprunt & Son* v. *United States*, 281 U.S. 249; *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd*, 350 U.S. 892, *rehearing denied*, 350 U.S. 943; *Utah Citizens' Rate Association* v. *United States*, 192 F. Supp. 12 (D. Utah 1960), *aff'd*, 365 U.S. 649.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented by appellant are clearly unsubstantial and that the judgment of the district court should be affirmed.

Respectfully submitted,

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Attorney for Appellees,
Richard Joyce Smith and
William J. Kirk,
Trustees of the property of
The New York, New Haven
and Hartford Railroad
Company, Debtor

March 13, 1967

JUDSON C. MCLESTER, JR.
Counsellor at Law
164 Lincoln Road
Westfield, New Jersey
201 – 233-6811

July 9, 1965

Interstate Commerce Commission
Washington, D.C.

Re: *Finance Docket No. 21989–90*

Gentlemen:

Oscar Gruss & Son, holders of $10,556,000.00 Principal amount of New York, New Haven & Hartford Railroad Company, First and Refunding Mortgage 4% Bonds, have intervened in the proceeding before this Commission for the reorganization of that Railroad, Finance Docket No. 21669. As such holders of New York, New Haven & Hartford Railroad Company Bonds, Oscar Gruss & Son are vitally interested in the conditions relating to that Railroad to be included in any order of this Commission authorizing merger of the Pennsylvania and New York Central Railroads.

The recommendation in the Examiners' Proposed Report for the merged Pennsylvania – New York Central to acquire the New Haven's freight operations upon terms to be fixed by this Commission if the parties are unable to agree (F.D. 21989-90) is entirely fair and reasonable. Oscar Gruss & Son having no objection thereto, have not sought to intervene in this proceeding which has so many ramifications relating to the broad public interest.

However, Oscar Gruss & Son respectfully request that this letter be made a part of the Record in Finance Docket No. 21989-90 for the purpose of making one minor suggestion — namely, that the condition relating to acquisition of the New Haven's freight operations be expanded to require the merged Pennsylvania – New York Central to assume responsibility for those operations upon the effective date of the merger, if prior thereto the parties have not come to an agreement as to terms.

Such a provision would be consistent with the Examiner's proper concern that New Haven interests should not be placed in a position to delay indefinitely the Pennsylvania – New York Central merger.

At the same time it would prevent the Pennsylvania – New York Central resorting to delaying tactics which would permit New Haven's operating losses to consume all its valuable assets before the transfer of its freight operations can be consummated,

This, we believe, is fair to all parties concerned.

Respectfully submitted,

JUDSON C. MCLESTER, JR.

Counsel for
Oscar Gruss & Son

Copies to:

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V.P. & General Counsel New York Central RR. Co.

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Manufacturers Hanover Trust Co.
Trustee First & Refunding Mortgage

Mr. A. Frederick Keuthen
Successor Individual Trustee, 1st & Refunding Mortgage

United States Trust Co. of New York
Trustee, Harlem River Division Ind. of 1st Mortgage

The Chase Manhattan Bank
Trustee, General Income Mortgage

Mr. Joseph R. Thompson
Successor Individual Trustee, General Income Mortgage

Secretary of the Treasury of the United States

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Hon. Louis J. Lefkowitz
Attorney General of State of New York

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION
OF A RAILROAD

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

PETITION OF OSCAR GRUSS AND SON AS HOLDERS OF FIRST AND REFUNDING MORTGAGE 4% BONDS, DATED JULY 1, 1947, OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FOR LEAVE TO INTERVENE.

TO THE HONORABLE ROBERT P. ANDERSON,
A JUDGE OF THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT SITTING
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT:

The petition of Oscar Gruss and Son (hereinafter called "Petitioners") as holders of First and Refunding Mortgage 4% Bonds (hereinafter called "4% Bonds") of the New York, New Haven and Hartford Railroad Company (hereinafter called the "Debtor"), respectfully shows:

1. Petitioners are members of the New York Stock Exchange and are holders in due course of $3,000,000, principal amount of 4% bonds.

2. Petitioners represent no holders of 4% Bonds other than themselves and have no present intention

of soliciting authorizations to represent or act for any other holders of 4% Bonds in this proceeding.

3. Petitioners may in the future be authorized or agree to represent and act for other holders of 4% Bonds, but in no event shall the number of holders whom Petitioners shall so represent and act for exceed twenty-five.

4. By order dated July 22, 1963, Petitioners were authorized by the Interstate Commerce Commission to intervene and become a party to the proceeding before that Commission in the New York, New Haven and Hartford Railroad Company Reorganization, Finance Docket No. 21669.

5. The 4% Bonds held by Petitioners represent a substantial interest in the property in the custody of, and subject to the control and disposition of, the Court in this proceeding.

6. Petitioners as holders of 4% Bonds may be materially and adversely affected by any plan of reorganization approved in this proceeding and pursuant to the provisions of Section 77 of the Federal Bankruptcy Act, as such holders, are entitled to oppose any plan proposed herein and to propose a plan of their own.

7. Petitioners may also be materially and adversely affected by disposition of the Debtor's properties or portions thereof pending proposals for and approval of a plan of reorganization. As an example of a possible material adverse effect upon their interest in the Debtor's property by disposition thereof, Petitioners refer to a certain Memorandum of Understanding, dated February 5, 1965, between the Debtor's Trustees,

the Pennsylvania Railroad Company and the New York Central Railroad Company, filed with this Court and made a part of the record herein on or shortly after March 31, 1965. Upon its face the Memorandum contemplates execution of a formal contract, subject to approval by this Court, whereby the merged Pennsylvania-New York Central, prior to any effort to reorganize the Debtor, would acquire substantially all of the Debtor's properties, except those portions thereof which the Pennsylvania-New York Central deem burdensome on the Debtor's operations, for a consideration which, in Petitioners' opinion, is wholly inadequate. Petitioners are entitled to be heard on the equity of any contract proposed herein pursuant to this Memorandum, as well as other proposed dispositions of the Debtors' properties or portions thereof, through presentation of evidence, argument and briefs, and if necessary to take any appropriate appeals.

8. The 4% Bondholders Committee has been permitted to intervene herein but Petitioners have not authorized that Committee to represent them or act upon their behalf, and Petitioners have no information as to the number of 4% Bonds represented by that Committee.

9. In order for Petitioners to adequately protect their interest in the development of a plan of reorganization for the Debtor and their interest in any disposition of the Debtor's properties or portions thereof, it is necessary for Petitioners to intervene generally in the proceeding so that they may receive notice of all applications and petitions to the Court.

WHEREFORE, Petitioners respectfully request:

That, pursuant to Sec. 77(c)(13) of the Federal Bankruptcy Act and Rule 24(a) (2) and (3) of the

Federal Rules of Civil Procedure, Petitioners be admitted and constituted as general parties to this proceeding with the right to receive notice of all applications and petitions, to receive copies of all papers filed herein, to make applications and petitions, to file motions, pleadings and other papers, and to be heard by testimony and argument; and that Petitioners have such other and further relief in the premises as to this Court may seem just.

Dated: June 7, 1965.

Oscar Gruss & Son

by JUDSON C. MCLESTER, JR.

Judson C. McLester, Jr.
Attorney for Petitioners

Judson C. McLester, Jr.
164 Lincoln Road
Westfield, New Jersey

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad,

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

MEMORANDUM OF DECISION ON PETITION TO INTERVENE

Oscar Gruss & Son, which is a partnership engaged in the brokerage of securities and which is a member of the New York Stock Exchange, has petitioned, on July 7, 1965, to intervene in this Chapter 77 proceeding on the representations that it is the holder in due course of $3,000,000 face value of New Haven Railroad First and Refunding Mortgage 4% Bonds and that it represents no other holder of this issue of bonds. Through discovery proceedings it was disclosed that on July 6, 1965 the petitioner, the partners of the petitioner and their affiliates, including spouses, held, of the issue mentioned, bonds of the face amount of $10,556,000, as well as $369,000 in the New Haven's 4½% bonds and $70,000 in the Harlem River Division 4¼%bonds. It also appeared that, as of July 6, 1965, one member of the firm was short 600 shares of New Haven preferred stock and 1,400 shares of New Haven common stock. The firm also held for customers' accounts $581,000 in face value of New Haven 4% bonds and $507,000 in face amount of New Haven 4½% bonds. Employees of the partnership also hold $81,000 in principal amount of the New Haven 4% bonds. The holdings of the petitioner, its partners and affiliates, have been acquired

since inception of the New Haven's reorganization proceedings on July 7, 1961.

Leave to intervene under §77(c)(13) is discretionary with the court. Discretion should be exercised in favor of intervention where it appears that the petitioner's interests are not being adequately protected or where such intervention would particularly aid or benefit the reorganization proceedings.

Neither ground has been either claimed or shown here. Petitioner's emphasis is mainly on the size of its interests. Size alone is, however, not a determining factor. Assuming the disclosed amounts of the holdings to be correct, recognition is given to a 10% or more holding by according the holder the right to file a reorganization plan, but this does not carry with it the right to intervene as a party. To decide otherwise and base intervention on size would create an impossible problem of where to draw the line and, once drawn, unless limited to very large holdings, would probably admit so many parties that the reorganization proceedings would become unmanageable. A single criterion of size would also operate to foreclose from intervention smaller holdings which were not being adequately protected.

The court is of the opinion that the petitioner's interests are adequately represented by the trustees under the mortgages and by the first mortgage bondholder's committee. The legitimate interests of the petitioner are, so far as anything shown in this case is concerned, the same as those of the trustees and the committee. The recognition of the petitioner's interests and the right to have them protected are in no wise lessened by the fact that, as a speculator in these bonds, the petitioner was unable to show how its intervention would

particularly aid or benefit the reorganization proceedings.

Section 77(c)(13) gives the petitioner the right to be heard on "all questions arising in the proceedings", and, to assist the petitioner in the exercise of that right, it may be added to the list of those entitled to notice of all matters assigned to be heard by the court in this case.

The petition to intervene is denied.

Dated at New Haven, Connecticut, this 25th day of August, A.D. 1965.

ROBERT ANDERSON
United States Circuit Judge
sitting by designation

SUPREME COURT, U.S.
MAR 15 1967
JOHN F. DAVIS, CLERK

No. 1066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

OSCAR GRUSS & SON, *Appellant,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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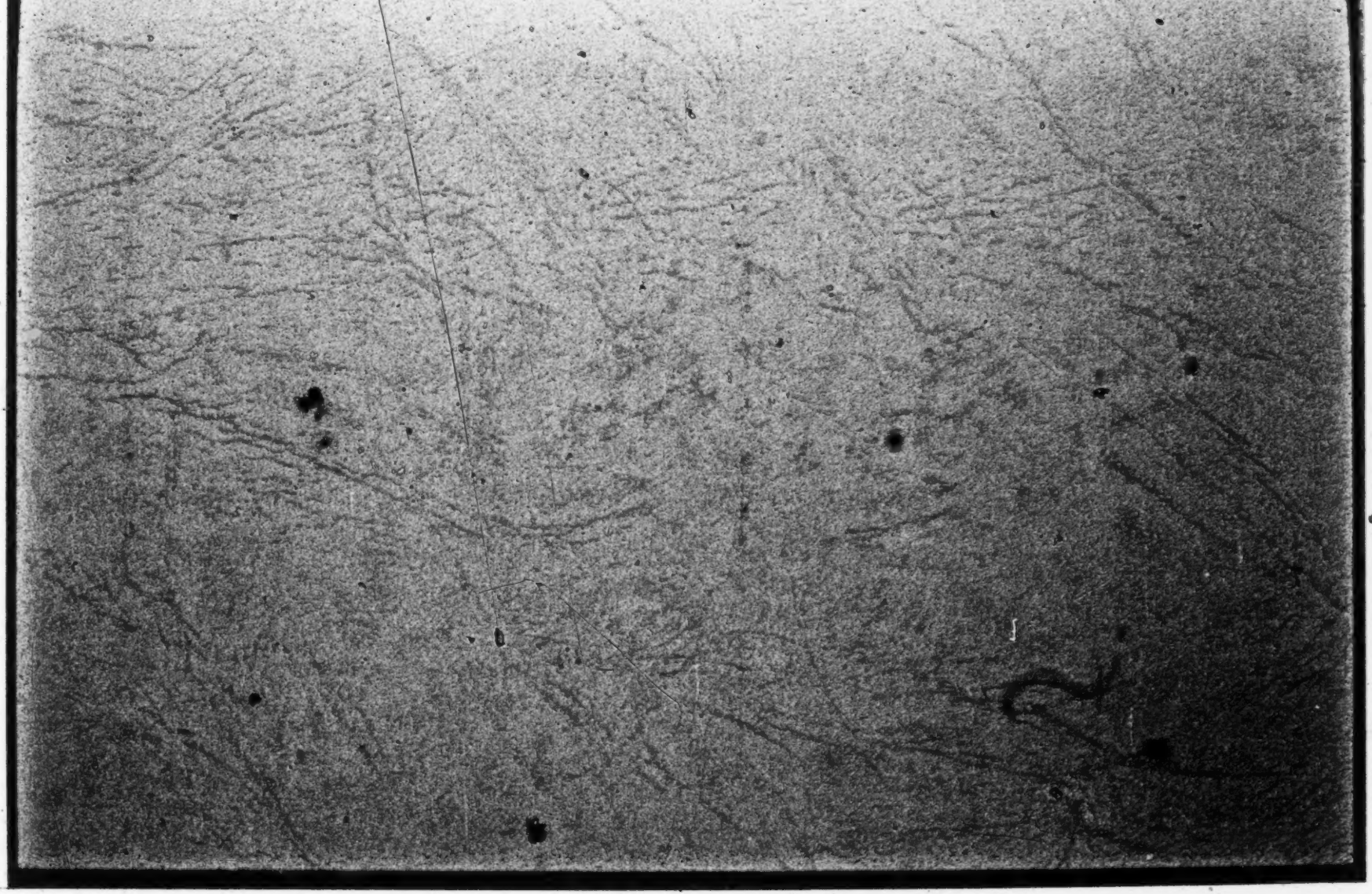

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON, *Appellant,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellees The New York Central Railroad Company (Central) and The Pennsylvania Railroad Company (Penn), pursuant to Rule 16(1)(c) of the Rules of this Court, move that the Final Judgment of the District Court granting summary judgment dismissing appellant's complaint be affirmed on the ground that the questions presented are so insubstantial as not to require further argument.

STATEMENT

Appellant, Oscar Gruss & Son (Gruss), is an investment banking firm and a member of the New York Stock Exchange. It has acquired as a speculator approximately 14 percent of the First and Refunding Mortgage 4 percent bonds of The New York, New Haven and Hartford Railroad, which is in reorganization in a proceeding under Section 77 of the Bankruptcy Act now pending in the United States District Court for the District of Connecticut.[1] Gruss is appealing from a unanimous decision of a three-judge district court convened in the Southern District of New York, entered November 28, 1966, that granted summary judgment dismissing an action brought by Gruss to set aside certain orders of the Interstate Commerce Commission.

The Commission orders that appellant sought to attack, so far as is here pertinent, authorized the merger of Penn and Central on the condition that the merged carrier agree to include both the freight and passenger operations of the New Haven "upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission." 327 I.C.C. at p. 553. The orders also provided that "in the event the parties are unable to reach an agreement (and subject to approval by

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[1] On August 25, 1965, Judge Anderson, sitting as a district judge in charge of the Section 77 proceeding, denied the petition of appellant to intervene in that proceeding, stating: "The recognition of the petitioner's interests and the right to have them protected are in no wise lessened by the fact that, as a speculator in these bonds, the petitioner was unable to show how its intervention would particularly aid or benefit the reorganization proceedings."

the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose." *Ibid.*

Appellant's challenge to the orders in the District Court rested solely on the fact that they permit consummation of the merger prior to actual inclusion of the New Haven in the merged company.

The Penn-Central merger case was instituted before the Commission on March 9, 1962, by the filing by Penn and Central of an application seeking authority to merge pursuant to Section 5(2) of the Interstate Commerce Act. On June 19, 1962, the United States District Court for the District of Connecticut, in the exercise of its powers under Section 77 of the Bankruptcy Act, authorized the Trustees of the New Haven to seek inclusion of that railroad in the proposed Penn-Central system. Thereupon, the Trustees intervened in the Penn-Central merger proceedings, filed with the Commission a petition for inclusion of the New Haven's freight operations and actively participated in the ensuing hearings.

In a brief submitted to the Examiners on June 1, 1964, the Trustees urged that inclusion of the New Haven's freight operations should be made a condition precedent to consummation of the Penn-Central merger. Soon after the close of the hearings before the Examiners, however, the Trustees undertook negotiations with Penn and Central and eventually entered into a Memorandum of Understanding, filed with the Reorganization Court on April 7, 1965, which contemplated, *inter alia*, abandonment of their demand for actual inclusion of the New Haven freight operations prior to consummation of the Penn-Central merger.

Shortly before the filing of this Memorandum of Understanding, on March 29, 1965, the Examiners in the Penn-Central case issued their recommended report. So far as the New Haven was concerned, the report recommended that that road be given the right to have its freight operations included in the Penn-Central system, but that actual inclusion should not be required as a condition precedent to consummation of the merger.

The Trustees filed no exceptions to the Examiners' recommendations. On the contrary, on August 16, 1965, in a reply to the exceptions of certain other parties they specifically supported the Examiners' conclusion that inclusion of the New Haven's freight operations should take place subsequent to the merger.

On April 21, 1966, the Trustees, Penn and Central entered into an agreement, subject to the approval both of the Commission and the Reorganization Court, embodying and amplifying the terms of the 1965 Memorandum of Understanding. That agreement, filed with the Reorganization Court on the same date, provided, consistent with the Examiners' recommendations, for inclusion of the New Haven's freight operations and not its passenger operations, and that subsequent rather than prior to the merger.

On April 27, 1966, the Commission released its order in the Penn-Central merger case. That order, although otherwise adopting the Examiners' recommendations as to the New Haven, required inclusion not only of its freight operations but of its passenger service as well. 327 I.C.C. at p. 553. Penn and Central accepted this additional burden and agreed with the Trustees to modify the agreement theretofore made

between them to reflect this condition, without reducing the consideration provided for in the agreement.

On September 13, 1966, the Trustees petitioned the Reorganization Court for authority to file with the Commission, pursuant to Section 77 of the Bankruptcy Act, a plan for reorganization. A hearing was held on October 10, 1966, in which appellant participated. The petition was granted on October 24, 1966, and three days later the proposed plan was filed with the Commission. Hearings with respect to this plan were commenced before an Examiner on January 16, 1967, and are still proceeding.

Although it was clear by April 1965 both that the Examiners had recommended that actual inclusion of any part of the New Haven's operations should not be required as a condition precedent to consummation of the Penn-Central merger and that the Trustees had determined to take a like position, appellant made no effort to assert its present contrary position until more than fifteen months later. It was not until July 11, 1966, that appellant first sought to participate in the Penn-Central merger case. On that day it filed a Petition for Leave to Intervene and Petitions for Reconsideration, Further Hearing, and Modification of the Commission's Order to require inclusion of the New Haven at the time of and as a condition precedent to consummation of the merger.

On September 19, 1966, the Commission issued a report and order on reconsideration. So far as appellant's petitions are concerned, the Commission noted that "Gruss seeks intervention to press for the immediate inclusion of NH in the merged system," that "the relief now requested is not justified," but that "Gruss,

as a substantial investor in NH securities, undoubtedly has an interest in the ultimate disposition of the bankrupt carrier's operations" and that "therefore, to obviate the need for another petition in order to participate in the inclusion proceeding, we will permit Gruss to intervene now and become a party herein * * *." 328 I.C.C. at pp. 306-07. The Commission concluded that "Oscar Gruss & Son should be permitted to intervene herein for the limited purposes described above" (328 I.C.C. at p. 330), and its order recited that appellant and another would-be intervenor should "be, and they are hereby, permitted to intervene and become parties herein for the limited purposes set forth in the said report on reconsideration, and that the petitions of these two intervenors be, and they are hereby, denied in all other respects."

In neither its April 27 or September 19 order did the Commission pass in any way on the terms of the New Haven inclusion in the Penn-Central system. That matter is now being considered in Commission hearings in which appellant has been granted the right to participate and is in fact participating.

On October 18, 1966, appellant filed its complaint in the court below against the United States and the Interstate Commerce Commission, asking that the Commission's orders be set aside insofar as they authorized consummation of the Penn-Central merger prior to actual inclusion of the New Haven. A bondholders committee intervened as plaintiff. The New Haven Trustees, Penn and Central intervened as defendants, and the latter two parties, together with the Commission, moved to dismiss the complaints. On November 28, 1966, the District Court granted this relief by enter-

ing a summary judgment, holding on the basis of decisions of this Court that because appellant's claims of injury were based on the apprehension of injury to the corporation in which it is a security holder, it lacked standing to maintain the action, and that in any event the Commission had acted "reasonably and within its powers." Juris. Statement, p. A-14.

ARGUMENT

Appellant argues at length in its Statement of the Case that the terms of the reorganization plan proposed by the Trustees of the New Haven are unfair. This challenge to the terms of the proposed reorganization plan is wholly premature. Those terms have not yet been passed upon by either the Commission or the Reorganization Court. They are currently being considered in a proceeding in the Commission in which appellant has been granted the right to participate and is participating. Appellant itself implicitly concedes that the fairness of the terms for inclusion of the New Haven in Penn-Central is not at issue here by omitting from its Statement of Questions Presented any question relating to those terms.

I.

Although appellant states seven questions as being presented, the only questions that it attempts to show to be substantial are all but facets of a single question. That question is whether a bondholder of a railroad in bankruptcy reorganization has standing to institute a suit to enjoin and set aside orders of the Interstate Commerce Commission on the basis of allegations that the orders may result in injury to the debtor railroad and thereby adversely affect the financial interests of the bondholder.

We submit that this question has long been settled adversely to appellant. Thirty-seven years ago this Court unanimously held in *Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U.S. 479, that a stockholder in a railroad lacked standing to bring an action to set aside an Interstate Commerce Commission order claimed to threaten the "financial stability" of the railroad, and that the fact that the appellant had been permitted to intervene in the Commission proceeding in which the order had been issued did not affect the result. Speaking through Mr. Justice Brandeis, the Court stated:

> "*First.* The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it, *Alexander Sprunt & Son* v. *United States, ante,* p. 249. Nor does the mere fact that its lines connect with those of the Wheeling near the City of Pittsburgh, Pennsylvania, entitle it to bring the suit. Its lines do not extend to Cleveland; and there is no suggestion that the order can affect it as carrier. Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or

> lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order. The bill should have been dismissed without inquiry into the merits." [footnotes omitted.] 281 U.S. at p. 486.

Appellant seeks to avoid the controlling effect of the *Pittsburgh* case by pointing to the sentence in the quoted passage where the Court noted that "unlike orders entered in cases of reorganization and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors." This language, however, affords no comfort to appellant. It refers to cases of reorganization or of acquisition of control in which the Commission's order determines whether the terms of the proposed transaction are fair and equitable to the stockholders or creditors of the corporation or corporations involved and thereby directly affects "the interests of investors."[2] The orders that appellant seeks to attack here embody no determination on the terms on which the New Haven is entitled to be acquired by Penn-Central. There will ultimately be a Commission decision on those terms that will be embodied in a different order. When that order is made it will be time enough for appellant to assert its right

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[2] As the District Court pointed out: "The 'some cases' phrase was illuminated by a footnote referring to various I.C.C. decisions considering the fairness of acquisitions to security holders of the roads to be acquired." Juris. Statement, p. A-9.

to be heard in an appropriate forum with respect to the fairness of the terms of inclusion. No question of the fairness of those terms is presented here.

Subsequent decisions have further illuminated the distinction drawn in the quoted passage between an order that can properly be said to "deal with" the interests of investors and one that merely affects such interests by affecting the corporation, and show that appellant's claim here falls into the latter category and not the former. *New York Central Securities Corp.* v. *United States,* 54 F.2d 122 (S.D.N.Y. 1931), *aff'd,* 287 U.S. 12, involved an attack on a Commission order authorizing the New York Central Railroad to lease the properties of certain railroads in which it was a majority stockholder. The plaintiff was a minority stockholder in both the Central and the lessor roads. In its former capacity it complained of a condition imposed by the Commission on the proposed transactions requiring acquisition by the Central of certain short line railroads. The Court ruled that the plaintiff had no standing to assert this claim "for clearly plaintiff cannot have sustained any injury in this respect other than indirectly through the lessee corporation", citing the *Pittsburgh* case. 54 F.2d at p. 125. The plaintiff also claimed injury as a stockholder of the lessor corporations, however, and the court found it to have standing in this capacity because under the terms of the particular leases the payments of rental dividends were to be made directly to the minority stockholders of the lessors and hence the plaintiff's alleged injury was "not merely derivative through its ownership of stock, but is an independent injury to itself as a member of a class created by the leasing agreements between lessors and lessee." 54 F.2d at p. 126.

Precisely the same line was drawn by this Court in *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151. In that case common stockholders of Alleghany sued to review Commission orders (a) directing that Alleghany should be "considered as a carrier" and therefore regulated by the Interstate Commerce Commission, (b) authorizing Alleghany to issue a new series of preferred stock, and (c) authorizing a merger of certain companies in which Alleghany held indirect stock interests. This Court held that the plaintiffs had standing to challenge the order of the Commission authorizing the issuance of a new issue of preferred stock because that stock was convertible and therefore threatened to dilute the equity of the common stockholders. It further held that since the plaintiffs had acquired standing to seek judicial review because of this threatened injury to their financial interests as common stockholders they could also challenge the Commission's order conferring on Alleghany the status of a "carrier" under the Interstate Commerce Act because the power of the Commission to approve the proposed stock issue depended on the validity of its order as to the status of Alleghany. 353 U.S. at pp. 159-60.

At the same time, however, this Court held that the plaintiffs were not "interested parties" entitled by statute to an evidentiary hearing before the Commission with respect to the merger transaction and the status order because "the merger agreement had no special effect on appellees or on common stockholders of Alleghany" (citing *New York Central Securities Corp.* v. *United States, supra*) and the status order did not "by itself pose any individualized threat to the welfare of the appellees." 353 U.S. at pp. 172-75.

In support of the proposition that the court below erred in denying it standing, appellant relies primarily on the *Chicago Junction Case,* 264 U.S. 258. Unlike the present case, however, the plaintiffs in *Chicago Junction* were not security holders in a railroad attempting to sue on the basis of threatened injury to the corporation, but rather a group of railroads suing in their own right to set aside an order giving one of their competitors a monopoly and subjecting them "to serious disadvantage and prejudice." 264 U.S. at p. 266. The only possible relevance of that case lies in the fact that the opinion contains dicta suggesting that a party permitted to intervene before the Commission has an automatic right thereafter to institute a suit to challenge any order issued. Even if it is assumed, however, that appellant here was in fact an intervenor before the Commission with respect to the orders that it seeks to challenge,[3] *Chicago Junction* would not support its position, for the implication that appellant seeks to draw from its dicta has been explicitly repudiated in subsequent decisions of this Court.

In *Alexander Sprunt & Son, Inc.* v. *United States,* 281 U.S. 249, the appellants were shippers who alleged that they had lost a competitive advantage by reason of a Commission order directing certain carriers to cease and desist from discriminatory rate practices. This Court held that the appellants' interest in their competitive advantage entitled them to intervene in the Commission proceeding and that if they did so they were also entitled to intervene as of right in any suit involving the validity of the order entered by the

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[3] But see footnote 3 of the District Court's opinion (Juris. Statement, p. A-16), which recognizes that the validity of this assumption is at best doubtful.

Commission in the proceeding. But the Court then added (281 U.S. at p. 255):

> "But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist."

The Court distinguished the *Chicago Junction Case* on the ground that there "an independent legal right of the plaintiff was affected by the order which it was sought to set aside." 281 U.S. at p. 257.[4]

The holding in *Sprunt* was specifically approved and applied in *Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U.S. 479, 486:

> "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it." (citing *Sprunt*).

The cases discussed make it abundantly clear, we submit, that the District Court was correct in holding

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[4] The *Sprunt* case also disposes of appellant's argument based on 28 U.S.C. § 2323. The predecessor of that statute, Section 212 of the Judicial Code, was specifically considered in *Sprunt,* and found not to confer standing to maintain an independent suit to review a Commission order on every intervenor in the administrative proceeding.

that appellant lacked standing to maintain this independent action on the grounds pleaded in its complaint.

Appellant itself concedes that "it may well be that the Trustees could and did preempt the field of participation in the Penn-Central merger proceedings, so long as they demonstrated a willingness to fight for the common interests of all creditors." Juris. Statement, p. A-26. It argues, however, that its interests and those of the other first mortgage bondholders have been abandoned by the Trustees and that therefore it is entitled to bring this action to protect those interests.

This is not a case where trustees are charged with self-dealing or fraud or other wrongdoing allegedly designed to benefit themselves at the expense of the beneficiaries it is their duty to represent. Even if it were, however, appellant's remedy would lie not in an action like that which it seeks here to maintain, but rather in appropriate proceedings before the Reorganization Court to oust the Trustees or to seek instructions for them. This Court has stated that the bankruptcy court has "exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced" (*Meyer* v. *Fleming*, 327 U.S. 161, 169), and the District Court was manifestly correct in holding that "power to instruct them [the Trustees] or to turn over the job to someone else is vested exclusively in the bankruptcy court." Juris. Statement, p. A-13.

II.

The only issue that Gruss presented to the Commission in its petition for reconsideration was whether inclusion of the New Haven should be made a condi-

tion precedent to consummation of the Penn-Central merger. In its petition, Gruss did not argue that the New Haven stood in need of interim protective conditions similar to those accorded to other railroads, nor did it ask the Commission for a hearing on whether such protective conditions should be prescribed and, if so, what their character should be. Hence, as the District Court found, on any view the only issue open on judicial review in that court was whether the Commission acted lawfully in refusing to postpone consummation for the long period that will necessarily be required to dispose of the inclusion application. See Juris. Statement, p. A-14.

The District Court properly held that in taking this position the Commission had acted "reasonably and within its powers." *Ibid.* The Commission had found that resolution of the problems presented by inclusion of the New Haven "would require time and much personal endeavor on the part of all those interested, thus precluding immediate inclusion." 328 I.C.C. at p. 306. It had found also that "a substantial postponement of consummation of the merger" would jeopardize the merger and thereby jeopardize any solution of the New Haven problem other than liquidation. 328 I.C.C. at p. 312. These considerations alone provide ample support for the action of the Commission, and for the refusal of the District Court to disturb that action.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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249-602—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (J.S. A–15) dismissing appellant's suit to set aside orders of the Interstate Commerce Commission approving the merger of the Pennsylvania Railroad Company and the New York Central Railroad Company (327 I.C.C. 475; 328 I.C.C. 304). The Commission, as a condition of approving the merger (see Interstate Commerce Act, § 5(2)(b), 49 U.S.C. 5(2)(b)), had ordered the inclusion in the merged company of the bankrupt New York, New

Haven and Hartford Railroad Company, under terms and conditions to be determined by the Commission and the bankruptcy court after the merger's consummation (327 I.C.C. at 522–527; 328 I.C.C. at 306, 318–320). Appellant, the holder of approximately 14 percent of the New Haven's first-mortgage bonds, challenged the Commission's orders on the ground that the Commission should have delayed consummation of the Penn-Central merger until the New Haven's inclusion in the Penn-Central system was wholly effected. Appellant argued that the New Haven's remaining assets would be dissipated if the road was forced to compete against Penn-Central.

The background of this dispute may be stated briefly. In July 1961, the New Haven filed a petition in the United States District Court for the District of Connecticut for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. In June 1962, shortly after Penn and Central had asked the Commission for permission to merge, the trustees appointed by the bankruptcy court (Judge Anderson) to act for the bankrupt New Haven asked the Commission to condition approval of the merger on inclusion of the New Haven in the merged system. They later took the position before the Commission that inclusion of the New Haven should be a condition precedent to consummation of the merger. However, after the Commission's hearing examiners, in their March 1965 report, recommended against such a condition, the trustees receded. In a memorandum of understanding with Penn and Central, filed in the bankruptcy court in April 1965 and with the Commission two months later, they agreed to the sale of the

New Haven's assets to the merged system upon terms and conditions to be determined after the merger was consummated.[1]

At this stage appellant was largely at one with the trustees. In July 1965 it had advised the Commission that the examiners' recommendations with respect to inclusion of the New Haven were "entirely fair and reasonable," that it had no objection to them and that it did not seek the status of an intervenor in the Commission proceeding—albeit it did offer (in its own words) "one minor suggestion": that the Commission require the merged company to assume responsibility for the New Haven's freight operations upon the effective date of the merger. One month earlier, in seeking intervention in the bankruptcy proceeding, appellant had alleged that the memorandum of understanding contemplated an inadequate consideration, but not that consummation of the Penn-Central merger should be postponed until the actual inclusion of the New Haven. Judge Anderson had denied intervention, ruling that appellant's interests were adequately represented by the trustees and by the bondholders' committee and that appellant had failed to show how its presence as a party would assist in the bankruptcy proceeding, and noting that appellant had purchased its bonds subsequent to the initiation of the bankruptcy proceeding and for purposes of speculation.[2] (Trustees' Motion to Affirm,

[1] The memorandum of understanding was later reduced to a detailed agreement as to price, terms and conditions.

[2] At the same time Judge Anderson ruled that appellant had a right to be heard on all questions in the proceedings and would be notified of all developments.

pp. A-8–10.) No appeal was taken from his decision.

In July 1966—after the Commission's decision of April 27, 1966, approving the Penn-Central merger on condition that the merged system include the New Haven on terms to be negotiated later—appellant, for the first time, argued to the Commission that inclusion of the New Haven should be required before consummation of the merger was allowed. In its report on reconsideration the Commission, on September 16, 1966, rejected this argument on the ground that the course proposed would entail undue delay (328 I.C.C. at 306). The same month the trustees submitted to the bankruptcy court a plan of reorganization contemplating the inclusion of the New Haven in the merged Penn-Central, which they asked leave to submit to the Commission for approval. In October, Judge Anderson, finding the plan *prima facie* suitable, authorized the trustees to expend the necessary funds in presenting it to the Commission but made clear that he would not pass on the merits of the plan—particularly its provisions for compensation of the bankrupt estate—until the Commission had approved a final plan setting forth the terms and conditions of inclusion.[3] Appellant has sought judicial review of this decision in the Court of Appeals for the Second Circuit, where the matter is now pending.[4]

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[3] The court's opinion is reprinted at pp. 10–19 of the Trustee's Statement and Plan of Reorganization submitted to the Commission, which has been lodged with this Court.

[4] Appellant's attack (J.S. 15–17) on the Trustees' two-step plan of inclusion is an issue in that appeal. Oral argument on the appeal is expected this spring.

In the proceeding below, the court held unanimously that appellant lacked standing to sue, and accordingly dismissed the suit. It further ruled—again unanimously—that the Commission had acted within the scope of its authority in declining to delay consummation of the Penn-Central merger as urged by appellant.

At the present time, hearings are in progress before a hearing examiner of the Commission to determine the terms and conditions of the New Haven's inclusion in Penn-Central and the suitability of the reorganization plan. Consummation of the Penn-Central merger remains stayed by order of this Court pending decision of the appeals of a number of Eastern railroads (and other parties) from the refusal of the same three-judge court to grant a preliminary injunction against the merger. *Baltimore & O. R.R.* v. *United States*, No. 642, this Term, etc.

ARGUMENT

1. The court below correctly ruled that appellant, as a creditor of the bankrupt New Haven, lacked standing to challenge the Commission's refusal to defer the Penn-Central merger until the details of the New Haven's inclusion in the merged system could be worked out.[5] Appellant itself appears to concede

[5] See *Pittsburgh & West Virginia Ry.* v. *United States*, 281 U.S. 479, 486–488; *American Power & Light Co.* v. *S.E.C.*, 325 U.S. 385, 388–389; *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 435; *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 160. The argument that appellant automatically may maintain suit because it was allowed to intervene before the Commission is without merit. *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249, 255; *Pittsburgh & West Vir-*

(J.S. 24)—as it must—that the bankruptcy laws contemplate that a bankrupt company shall speak with one voice: that of the trustees, representing the interests of all of the creditors. See Bankruptcy Act, §§ 77(c)(2), 44. It would be chaos to permit each creditor or group or class of creditors to assert positions contrary to that of the trustees in litigation affecting the bankrupt estate (J.S. A–10–11).

So saying, we do not suggest that particular creditors are not entitled to make their views heard in the formulation of the trustees' position. Of course they are. But the proper place for such a hearing is in the bankruptcy proceeding. Only there can a single position be fashioned that will best represent the interests of the creditors as a whole. Appellant had an opportunity—of which it availed itself—to present its views to Judge Anderson in the bankruptcy proceeding. Although Judge Anderson ruled against appellant, appellant has pending in the Court of Appeals for the Second Circuit an appeal from his decision. If the appeal succeeds, the trustees' instructions may be changed. But if it fails, appellant, like the other creditors of the New Haven, will, we submit, be bound by the instructions that Judge Anderson has given. For it would be manifestly incompatible with orderly bankruptcy administration to allow collateral litigation in which the bankrupt estate was involved to be-

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ginia, *supra*, at 486. Accord: *Group of Boston & P.R.C. Stockholders* v. *Interstate Commerce Commission*, 133 F. Supp. 488, 492–493 (E.D. Va.), affirmed *per curiam*, 350 U.S. 926; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76, 78 (E.D. Mo.), affirmed *per curiam*, 350 U.S. 892; *Seatrain Lines* v. *United States*, 152 F. Supp. 619, 622 (D. Del.), affirmed *per curiam*, 355 U.S. 181.

come a vehicle for attempting to resolve disputes among the creditors.

2. Alternatively, we urge that appellant lacks standing to maintain this suit because it is not injured by the orders it is challenging. The extent to which the bankrupt estate will be able to satisfy appellant's claim against it depends on the price that Penn-Central pays for the New Haven's assets. That price has not yet been determined. The Commission will fix it (subject to review by the bankruptcy court, see Bankruptcy Act, § 77 (d), (e)) in the current proceeding on the terms and conditions of the New Haven's inclusion in the merged system. Unless and until that price is set at a level too low to pay appellant's claim in full, appellant has no possible cause to complain. To be sure, appellant expresses fear that if consummation of the merger is permitted before the actual inclusion of the New Haven, the competition of the merged system will cause a further deterioration in the value of the New Haven's assets. However, in fixing the price that Penn-Central must pay the New Haven for its assets, the Commission can, of course, as the court below expressly held (J.S. A–6–7), insist that the merged system restore any losses it may have inflicted on the New Haven. Only if the Commission fails to do so will appellant be aggrieved. At this stage the injury appellant complains of is purely hypothetical, and its challenge premature.

3. In stressing our view that appellant lacked standing to maintain this action, we do not mean to intimate disagreement with the view of the district court that, on the merits too, appellant's suit must fail.

The United States, to be sure, has joined with a number of the Eastern railroads in questioning the propriety of the Commission's refusal to postpone consummation of the Penn-Central merger pending the outcome of proceedings to determine whether three Eastern roads—the Erie-Lackawanna, the Delaware and Hudson, and the Boston and Maine—should be included in the Norfolk and Western system and to formulate conditions for the protection of those roads from competitive harm until inclusion is effected. That case is now awaiting decision by this Court. *Baltimore & O. R.R.* v. *United States,* No. 642, this Term, etc. The issues, however, are quite different from those here—as evidenced by the fact that Judge Weinfeld, who dissented in that case, joined the decision below.

The sole concern of the United States in the *Baltimore & O. R.R.* case was that, by permitting consummation before resolving the fate of the three affected roads and devising final interim protective conditions, the Commission was impairing its ability to fashion a solution that would assure the survival of the affected roads in an alignment consistent with the public interest. Concretely, the United States expressed fear that should it prove impracticable to devise effective interim protection, the survival of the affected roads might be jeopardized, and that should it prove impracticable to require the Norfolk and Western to absorb those roads in the weakened state to which the competition of Penn-Central might reduce them, the Commission might be drawn into approving a possibly unsound solution to the problem of the orphan roads—

such as their affiliation with the Penn-Central or a merger between Norfolk and Western and the C&O–B&O system.

No similar danger is presented by the Commission's refusal to postpone consummation of the Penn-Central merger until the terms of the New Haven's inclusion are determined. We take it to be common ground among all the principal parties that the public interest supports the inclusion of the New Haven in the Penn-Central system if such a system is created. Indeed, the home for the New Haven that the merger provides is an important reason advanced in support of the merger. On this phase of the Penn-Central controversy, then, the only issue involves the details of the inclusion—in particular, the price that Penn-Central will be required to pay for the New Haven's assets. That issue, we believe, can be resolved as readily after the consummation of the merger as before. There is no reason to believe either that Penn-Central will be unable to pay a fair and reasonable price for the assets or that the Commission's order directing inclusion will come unstuck because of haggling over the terms and conditions of the transaction. At least, the danger seems sufficiently remote that the Commission could deem it outweighed by the interest in prompt consummation. Nor was the Commission required to devise conditions for the interim protection of the New Haven. No one had requested that such conditions be imposed, perhaps because—the New Haven already being bankrupt—it was thought that the time when

such conditions might have served a useful purpose had passed.

CONCLUSION

The judgment of the district court should be affirmed.*

Respectfully submitted.

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DONALD F. TURNER,
Assistant Attorney General.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission.

MARCH 1967.

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* We recognize that the Court may wish to defer action on this appeal until it decides the pending appeals in the *Baltimore & O. R.R.* matter. Should the Court adopt the most extreme position there urged—that the Penn-Central merger should be permanently enjoined—this appeal would obviously be moot. Should the Court direct the entry of a preliminary injunction against the merger on the ground that the Commission is required to decide all related matters before permitting consummation of a major rail merger, and should it be disposed to reject our standing argument in this case, it might—depending of course on the reach of its opinion—appropriately remand the present case for further consideration of the merits of appellant's suit.

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SUPREME COURT, U.S.

APR 5 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT OPPOSING MOTIONS TO CONFIRM

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April 3, 1967.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT OPPOSING MOTIONS TO CONFIRM

Appellant, Oscar Gruss & Son ("Gruss"), is the owner, with partners and affiliates, of 14% of the outstanding First and Refunding Mortgage bonds ("first mortgage bonds") of The New York, New Haven and Hartford Railroad Company ("New Haven"). Gruss is appealing from a summary judgment of a three-Judge United States District Court for the Southern District of New York (Jurisdictional Statement, Appendix A) dismissing its complaint in an action to set aside, in part, two orders of the Interstate Commerce Commission ("Commission"). Appellees have filed motions to dismiss the appeal.[1]

[1] Three separate motions were filed: the "Commission motion" by the United States and the Commission, the "Penn-Central motion" by the intervening defendants The Pennsylvania Railroad

The New Haven is bankrupt. Proceedings for its reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, were commenced on July 7, 1961, and are pending in the United States District Court for the District of Connecticut (the "Reorganization Court"). The first mortgage bonds are outstanding in the principal amount of $76,819,900, with interest in default of approximately $18 million. The holdings of Gruss are approximately $10½ million principal amount, with interest in default of approximately $2½ million.

Gruss was permitted to intervene and become a party to proceedings before the Commission for the merger of Central into Penn (the "Penn-Central merger proceedings"), in which the Commission found that the merger could destroy the New Haven; and conditioned its approval of the merger upon the inclusion of the New Haven in the merged Penn-Central at some indefinite time in the future (327 I.C.C. 475). The Commission denied the petition of Gruss for modification of that condition to require inclusion of the New Haven at the time of the merger, and for a hearing on the proposed modification (328 I.C.C. 304, Appendix B to Jurisdictional Statement).

The Gruss complaint, seeking judicial review of the denial of his petition, was filed pursuant to the Judicial Code, particularly 28 U.S.C. §2323. The complaint was summarily dismissed on the sole ground that Gruss had no standing to institute or maintain the action.

As shown in the Jurisdictional Statement, pp. 19-27, the Court below erred in so holding. The motions to dismiss do not deny the misreading by the Court below of

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Company ("Penn") and The New York Central Railroad Company ("Central"), and the "Trustees' motion" by the intervening defendants Richard Joyce Smith and William J. Kirk, Trustees of the property of the New Haven (the "New Haven Trustees").

Alleghany Corp. v. *Breswick & Co.*, 355 U.S. 151 (1957), and strain to distinguish this Court's holding that the appellees in *Breswick* did have standing to challenge both the Commission orders. The standing of Gruss to challenge the Commission orders here is based on an interest far more substantial, and far more directly threatened by the Commission orders, than the interest of the appellees in *Breswick*. It is an interest which, when the Gruss petitions were filed, was not represented by anyone else in the Commission proceedings. The New Haven Trustees had flatly committed themselves not to oppose Penn and Central, whatever the interests of the estate and of bondholders. (Jurisdictional Statement, p. 12).

The opinion of the Court below, and the three motions to affirm, are based upon the underlying assumption that to hear and determine the contentions of Gruss on the merits, or to grant the relief he seeks, would delay consummation of the merger of Penn and Central, and that the public interest demands immediate consummation of that merger in its present context. That assumption, never soundly based, has been proven erroneous by the decision of this Court in *Baltimore & Ohio R. Co.* v. *United States*, — U.S. — (March 27, 1967), 35 U. S. Law Week 4271. The Court there reversed the judgment of the three-Judge District Court (the same Court as the one below here) that had denied an interlocutory injunction to restrain consummation of the merger, and remanded the cause with instructions that it be remanded to the Commission for further proceedings. We have thus reached the point, foreseen in note 6 at page 10 of the Commission motion, at which this Court might "appropriately remand the present case for further consideration of the merits of appellant's suit."

That suggestion requires some amplification, but is essentially sound. It is one thing for the Commission

and the Court below to decide that a merger scheduled to proceed at breakneck pace should not be flagged down, even briefly, to allow the New Haven aboard by way of inclusion. However, the petition for simultaneous inclusion of the New Haven involves different considerations at a time when the merger is waiting at the station, held there by factors other than the needs of the New Haven, and held by an order of this Court deciding in favor of other roads seeking protection, issues very similar to those being raised by Gruss in his complaint to the Court below.

In view of the basic change in circumstances that has occurred, it is unnecessary to deal at length with the erroneous views expressed in the motions concerning the merits of Gruss' petition. It is enough to point out again, as in the Gruss petitions to the Commission, that a condition requiring inclusion of the New Haven simultaneously with the Penn-Central merger need not delay that merger at all. It would be wholly feasible for Penn-Central, at that point, to take over the New Haven properties and operations subject to existing liens. The liens would be cancelled later against payment of their equitable equivalent, in cash or in kind, as finally determined in the consolidated proceedings now pending for the inclusion of the New Haven in the Penn-Central merger and for the reorganization of the New Haven.[2]

These proceedings have emphasized the necessity for allowing Gruss, as a major bondholder of the New Haven, a genuine opportunity to be heard. As shown in the Juris-

[2] Those proceedings were referred to a hearing examiner by order of the Commission dated November 9, 1966. The hearings commenced on January 16, 1967, and are nearing conclusion. The final sessions are to commence on May 3, 1967. There is to be no report of the hearing examiner. Briefs are to be submitted to the Commission on June 5, 1967, reply briefs on July 17, 1967, after oral argument, which has been tentatively scheduled for June 15, 1967.

dictional Statement (page 12) the New Haven Trustees have disabled themselves, by commitments undertaken in the April 21 Document, from representing bondholders or opposing Penn-Central. They have vigorously opposed the representation of bondholders and supported Penn and Central throughout the proceedings. The suggestion in the motions that bondholders may be heard in the Penn-Central merger proceedings only through the New Haven Trustees, and not through their own counsel, would mean that bondholders cannot be heard at all.

Conclusion

The Court should take jurisdiction of the appeal, reverse the summary judgment of the Court below, and remand the cause with instructions that it be remanded to the Commission for a hearing on the merits of the Gruss petitions.

Respectfully submitted,

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April 3, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

OSCAR GRUSS & SON *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1060. Decided May 8, 1967.

PER CURIAM.

Appellant is a bondholder of the New York, New Haven and Hartford Railroad Company (the New Haven), which is now undergoing a reorganization under § 77 of the Bankruptcy Act. On April 6, 1966, the Interstate Commerce Commission directed inclusion of the New Haven in the merger of the New York Central Railroad Company and the Pennsylvania Railroad Company as soon as terms and conditions could be settled, but approved the Penn-Central merger and authorized its consummation prior to such inclusion. Appellant then petitioned the Commission to reconsider this order. The Commission allowed appellant to intervene but denied the petition to reconsider, and appellant then challenged the Commission's order of April 6 in the District Court, which dismissed the complaint on the ground, among others, that appellant lacked standing to attack the Penn-Central merger. Since that time this Court has reviewed other aspects of the Commission's order approving the merger and has directed a remand to the Commission for further proceedings. *Baltimore & Ohio R. Co.* v. *United States*, — U. S. —. Since the order which appellant's suit attacked is now subject to further consideration by the Commission and since proceedings to achieve inclusion of the New Haven are also under way before the Commission, it appears inappropriate to review the decision of the District Court at this time.

Rather, we vacate the order of the District Court and remand the case to that court. Should appellant still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court.

It is so ordered.